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From War on Crime to Liberal Security State:  
The New Deal and American Political Legitimacy

By

Anthony Lee Gregory

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requirements for the degree of  
Doctor of Philosophy  
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Committee in charge:

Professor Rebecca M. McLennan, Chair

Professor Daniel J. Sargent

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Abstract

From War on Crime to Liberal Security State: The New Deal and American Political Legitimacy

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Professor Rebecca M. McLennan, Chair

This dissertation explores the intersection of the New Deal and the war on crime in the 1930s and 1940s, and argues that their interaction drove state-building in three major ways. First was the expansion and modernization of American law enforcement and criminal justice. Second was the legitimization of national political authority, which had been unstable since Reconstruction. This legitimization relied on a new war on crime coalition built by the Roosevelt administration. Third was the transformation of American government, particularly in the structure of American federalism, which in turn transformed American liberalism as both a political ethos and a political program. The chapters narrate the predicament for American law and order from the late-nineteenth century through World War II, and along the way describe the New Deal developments in criminal law, the FBI, criminological thought, drug control, constitutional interpretation, and security-state policy.

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## Introduction

Less than a week before the 1936 election, President Franklin D. Roosevelt, campaigning for a second term, proudly defended his agenda in front of a Brooklyn audience. He heralded the standard New Deal programs from the National Recovery Administration to the Tennessee Valley Authority. Roosevelt then boasted of his “successful war on crime” for making the country’s “homes and places of business safer against the gangster, the kidnapper and the racketeer.” He rebuffed his detractors who saw his various policies as “meddling and interference,” and celebrated his New Deal and crime policies as “new stones in a foundation” for “a structure of economic security for all our people—a safer, happier, more American America.” The struggle against crime, the president suggested, was part of his broader social platform, one essential to securing the nation.<sup>1</sup>

Roosevelt echoed the language of his predecessor President Herbert Hoover in referring to a “war on crime,” a phrase that effectively captured their anti-crime policies’ institutional mobilization and strategic energy, putting aside the normative assumptions they intended to convey.<sup>2</sup> Just as he suggested in his 1936 speech, Roosevelt indeed oversaw a sharp escalation in the multipronged offensive. At all levels of government, most strikingly at the federal, law-enforcement powers and activities exploded on his watch. After alcohol prohibition ended the federal criminal code ballooned. The New Deal’s activist liberalism fueled a nationwide surge of criminal justice powers, even as crime rates fell. The Roosevelt administration flexed its interstate-commerce muscles against bank-robbers and targeted new classes of contraband from automatic firearms to marijuana. Progressive constitutionalism and ideas about social welfare accommodated the new wave of criminalization. Federal law enforcement gained unprecedented investigative and enforcement powers. Alcatraz became a civilian installation, prison construction accelerated, and incarceration, parole, and probation rates broke national records.

This dissertation argues that the New Deal war on crime not only dramatically revamped criminal justice, but significantly shaped the overall trajectory of American politics and policy. The Roosevelt administration’s crime policies served to legitimate national enforcement authority, which not only allowed for the ambitious New Deal agenda but more generally laid the foundations of modern American government. To undertake this legitimation, the Roosevelt administration prevailed where all previous attempts had failed in building enduring relations across society and the different scales of government. This undertaking radically restructured American federalism, the distribution of power between the federal and state authorities. This institutional revolution relied on a political realignment that drove a metamorphosis of liberalism itself. Roosevelt and those of his top officials with a hand in crime policy in effect created a war on crime coalition to transcend the previous institutional and ideological divisions that precluded

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<sup>1</sup> Address at Brooklyn, N.Y., 30 October 1936, APPUCSB.

<sup>2</sup> In considering the policymakers’ posture, perhaps no phrase works better than “war on crime.” The 1930s campaign against crime entailed numerous battles, strategies, tactics, fronts, public relations, and ideological as well as material mobilization. As with any proclaimed war against such a broadly defined enemy—like the war on terror or the war on poverty—there was an openendedness that would not apply to wars against designated nation states. An endpoint would be elusive, victory or defeat would be hard to identify, and mission creep would be baked in to the very project. But this open-endedness does not always stop policymakers from treating their “war” as such—racking up casualties, forgiving collateral damage, demanding emergency powers, invoking the specter of civilizational or existential danger.

a nationally cohesive effort. Academia, the legal community, and law enforcement found a place in this coalition. Several groups that became essential constituencies to Roosevelt's Democratic Party—organized labor, white Southerners and African-Americans—had historically found themselves in conflict with or left behind by the core enforcement powers of the national government. The New Deal war on crime directed enforcement authority in new ways that brought these groups deeper into Roosevelt's ambit, resolving the tensions between the individualist liberalism and progressive liberalism of past eras so as to yield a pragmatic synthesis. By the late 1930s, the New Deal was constructing a federalism and liberalism that would accommodate a new security state even before the formal launch of war preparations. In short, the modern American state, its peculiar unity of welfare liberalism, carceral repression, national security, and militaristic regimentation, arose in large part from the crucible of the Roosevelt administration's anti-crime campaign.<sup>3</sup>

Historians acknowledge the New Deal war on crime, but few have closely or extensively examined its transformative impact on modern governance and liberalism. The political and legal history scholarship have not come together to form a synthesis. Historians of crime and punishment have provided a rich narrative of the Progressive era, and others have excavated the postwar origins of the modern carceral state, but few have scrutinized the eight pivotal years from the end of Prohibition up to U.S. entry into World War II. Intellectual historians and historians of legal thought have highlighted the radical evolution of 1930s liberalism, but have mostly neglected its consequential dialectic with crime-fighting. Historians of the security state have paid scant attention to the criminological factors in the New Deal's modification of American liberalism.<sup>4</sup>

Political historians have long recognized the war on crime as part of the New Deal story, but have not pondered the breadth of its political implications. William Leuchtenburg's canonical tome identified Roosevelt's anti-crime reforms as an example of the greater effort to impose national solutions in response to "the impotence of local governments."<sup>5</sup> In the half-century since Leuchtenburg, New Deal historians have tended to ignore or cursorily acknowledge crime policies depending on their general approach. Historians assessing the New Deal as the fulfillment of a socio-economic agenda have said little about crime fighting. In the 1980s historians turned away from high politics and toward the labor agenda, privileging a focus on aspirations and vision over tangible policy legacies. Christopher Tomlins's emphasis on industrial pluralism drew a fatalist outlook on reform from the conservatism of the Wagner Act.<sup>6</sup> In 1990, Lizabeth Cohen's social history stressed not institutional continuity but workers' solidarity, which constituted a political consciousness whose importance she prioritized over lasting policy changes.<sup>7</sup> The emphasis on political vision easily yielded to a particular focus on

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<sup>3</sup> By "welfare liberalism," I am referring to the twentieth-century program of attenuating nineteenth century individualist liberalism through the incorporation of a capitalist welfare state. The New Deal and Great Society variants of liberalism are the paragon examples.

<sup>4</sup> These characteristics of the literature are each taken up in the following paragraphs.

<sup>5</sup> William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963), 334.

<sup>6</sup> Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985), 102–103.

<sup>7</sup> Lizabeth Cohen, *Making a New Deal: Industrial Workers in Chicago, 1919–1939* (Cambridge: Cambridge University Press, 1990), 8.

the creation of a new liberalism. Alan Brinkley defined New Deal liberalism in 1996 as a pragmatic and consumerist program forged in the experiences of proto-Keynesian war prosperity.<sup>8</sup> Despite highlighting governing experimentation, Brinkley did not consider the impact of law enforcement on redefining liberalism.

On the other hand, those analyzing the New Deal as an era of governance have recognized state-building beyond narrowly defined questions of political economy without fully considering the ideological implications of crime and punishment. In 1999 David Kennedy stressed neither labor solidarity nor pragmatic macroeconomic planning so much as the “new historical epoch” in which prosperity combined with Roosevelt’s “social vision” to form the “intellectual building blocks” of a more inclusive society.<sup>9</sup> Kennedy’s framing of the New Deal as a temporal break invites questions about what government actually did in the relevant years—a detailed account of which constitutes much of his narrative, although he says little about crime. Writing in the same year, Ira Katznelson put aside middle-class economic pragmatism and worker-class aspirations and showed that the New Deal state perpetuated an inegalitarian legacy into the 1940s and beyond, effectively redistributing wealth to elevate poor whites at the expense of African-Americans.<sup>10</sup> Katznelson’s broader study, *Fear Itself*, elaborated on this theme in 2013, exposing not only New Deal America’s regressive and reactionary aspects, but its violence and terror. *Fear Itself* defines the New Deal through the actual governing policies from 1933 and 1953, openly assessing the Jim Crow Democrats’ role as well as the transnational context—the rise of competing central planning regimes in Europe, ranging from social democratic to left- and right-totalitarian—reinforcing Katznelson’s consideration of Roosevelt and Truman’s security state as defining components. Despite this recognition of the central role of state coercion, Katznelson barely discusses crime and punishment.<sup>11</sup>

Indeed, few studies examine the New Deal war on crime directly. Claire Bond Potter’s 1998 *War on Crime* exists as a lonely monograph, emphasizing the cultural setting of the FBI’s aggrandizement to combat gangsterism in Roosevelt’s first term.<sup>12</sup> Kenneth O’Reilly’s widely read 1982 article “New Deal for the FBI” stresses tensions between the Bureau’s dramatic 1930s expansion and the rest of the New Deal, and indeed criticizes Leuchtenburg’s formulation, which he perhaps overstates as casting “[t]he crime reforms [as] a microcosm of the New Deal.”<sup>13</sup>

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<sup>8</sup> Alan Brinkley has sought to explain why the New Deal liberalism that thrived in postwar America diverged “from the ideas that had characterized much of the New Deal itself.” Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Books, 1996 [1995]), 14.

<sup>9</sup> David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945* (New York and Oxford: Oxford University Press, 1999) 374–5, 377.

<sup>10</sup> Ira Katznelson, *When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America* (New York: W.W. Norton, 2006).

<sup>11</sup> The Jim Crow Democrats “almost giddily propelled” the New Deal’s “radical economic policies, a program that offered the South a chance to escape its colonized status while keeping its racial order safe,” according to Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (New York: W.W. Norton, 158).

<sup>12</sup> Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick: Rutgers University Press, 1998), 200.

<sup>13</sup> Kenneth O’Reilly, “A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security,” *The Journal of American History*, Vol. 69, No. 3 (Dec., 1982), 640. In addition, Athan Theoharis’s general history of the FBI includes a short chapter titled, “The Deal and a War on Crime,” which finds gangsterism inspiring “an enhanced federal role in curbing crime” but does not more deeply address institutional and ideological connections, saving discussion of the 1930s surveillance state for the next chapter. Athan Theoharis, *The FBI and American Democracy: A Brief Critical History* (Lawrence, KS: University Press of Kansas), 38.

Legal historians of crime and punishment recognize the New Deal war on crime but have produced little sustained or archival work. Samuel Walker calls the 1930s the “Law-and-Order Decade” and credits the New Deal for a “significant expansion of the federal role in criminal justice and police reform.”<sup>14</sup> Michael Willrich, writing in Michael Grossberg and Christopher Tomlins’s *Cambridge History of Law in America*, finds that the “historical record contradicts” the “conventional wisdom” that depicts the New Deal as finally ending the criminal-justice moralism of progressivism and prohibition. But after a page and a half focusing on criminal statutes and the FBI, citing a work by Walker and a Bureau of Justice Statistics page, Willrich says little more than to conclude that, although the “federal government never seriously threatened to seize control of criminal justice from the state and local governments,” the interwar period left a long-lasting impact.<sup>15</sup>

Scholars pursuing the connection between liberalism and criminal justice have traditionally underlined other decades of the twentieth century. A scattered literature addresses Progressive-era approaches to law and order.<sup>16</sup> Recent scholarly accounts of the war on crime’s importance to constructing the modern liberal state usually highlight postwar origins. Christopher Agee finds policing leniency in the construction of postwar liberalism.<sup>17</sup> Jonathan Simon stresses crime in modern modes of governance but without closely examining early-twentieth-century liberal ideas.<sup>18</sup> Naomi Murakawa and Elizabeth Hinton have focused on liberal complicity in modern

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<sup>14</sup> Samuel Walker, *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington, MA: Lexington Books, 1977), 131, 139.

<sup>15</sup> Michael Willrich, “Criminal Justice in the United States,” in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America: Volume III: The Twentieth Century and After (1920–)* (Cambridge and New York: Cambridge University Press, 2008), 209–211. In his book *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge: Cambridge University Press, 2003), Willrich writes that “the rhetorics of institutions of crime control and socialization settled into a belligerent coexistence” in the New Deal war on crime (310).

<sup>16</sup> Lawrence M. Friedman surveys the era in chapters 12 through 15 in *Crime and Punishment in American History* (New York: Basic Books, 1993). On punishment and correction, David J. Rothman for years defined the discussion in *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston: Little, Brown and Company, 1980). Rebecca M. McLennan has challenged such dominant social theories about the era’s incarceration in *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* (New York: Cambridge University Press, 2008). Khalil Gibran Muhammad tracks the role of racial criminalization through the period in “Incrimination Culture: The Limits of Racial Liberalism in the Progressive Era,” chapter 3 in his book *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA: Harvard University Press, 2010). Samuel Walker focuses broadly on police modernization, spanning from the late antebellum era through the 1940s, in *A Critical History of Police Reform: The Emergence of Professionalism* (Lexington, MA: Lexington Books, 1977). Scholars have frequently cited Joseph Gerald Wood’s unpublished PhD dissertation “The Progressives and the Police: Urban Reform and the Professionalization of the Los Angeles Police,” (UCLA, 1973). Janice Appier covers gender politics and Progressive era–Los Angeles in *Policing Women: The Sexual Politics of Law Enforcement and the LAPD* (Philadelphia: Temple University Press, 1998). On the FBI’s origins see Athan G. Theoharis, *The FBI & American Democracy*. Alfred W. McCoy, *Policing America’s Empire: The United States, the Philippines, and the Rise of the Surveillance State* (Madison, WI: The University of Wisconsin Press, 2009), discusses the progressive affinities between domestic policing and foreign policy.

<sup>17</sup> Christopher Lowen Agee, *The Streets of San Francisco: Policing and the Creation of a Cosmopolitan Liberal Politics, 1950–1972*. Chicago: University of Chicago Press, 2014.

<sup>18</sup> Jonathan Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford and New York: Oxford University Press, 2009).

incarceration, finding most of the definitive story after the 1950s.<sup>19</sup> This literature, indispensable to understanding the modern liberal carceral state, nevertheless overlooks the critical impact of the New Deal, during which many of the postwar liberal tensions they identify took root.

Scholarship that tracks the legal and constitutional legacies of the 1930s development of liberalism rarely focuses on crime and punishment—even when it recognizes the defining interplay between postwar legal liberalism and criminal procedure.<sup>20</sup> Laura Kalman considers the Warren Court era’s paradoxes in liberal jurisprudence but does not trace them explicitly to 1930s criminology and legal thought. Recent revisionist approaches to the Lochner era and legal interpretation have not grappled with the Fourteenth Amendment and due process implications for criminal procedure, and the jurisprudential story of New Deal liberalism remains dominated by the administrative state with less attention paid to criminal justice.<sup>21</sup>

Recent historical works on state-building have gestured toward criminalization and the New Deal, inviting more consideration for the full political implications. Lisa McGirr writes that “Roosevelt’s New Deal war on crime grew out of the prohibition wars” and the “crime control that began in 1919” survived Prohibition.<sup>22</sup> If McGirr’s work looks forward into the 1930s, James Sparrow’s treatment of World War II looks backward for antecedents. Sharing Katznelson’s emphasis on the domestic imprint of the security state, Sparrow centers Roosevelt’s charismatic leadership in the production of political legitimacy and notes the propagandistic continuities: Roosevelt drew on “tropes from the New Deal war on crime” to condemn “the actions of Japan, Germany, and Italy as ‘criminal,’ the work of ‘gangsters’ and ‘bandits.’”<sup>23</sup>

The inclusion of the wartime security state in the origin story of New Deal liberalism implies a key role for domestic coercion, but few historians have contemplated the function of 1930s criminal justice powers in linking the warfare and welfare states. Despite its centrality to the New Deal war on crime, World War II intelligence gathering, and American security and crime policy ever since, the FBI appears on only five pages of Kennedy’s *Freedom from Fear*, an 871-page sweep of American history encompassing the entire Roosevelt administration. The National Recovery Administration, in contrast, lasted only two years and enjoys mention on 25 different pages.<sup>24</sup> Katznelson does most to incorporate the 1930s FBI security state into the broader New Deal story, but chiefly as a seven-year prologue to World War II. This almost teleological

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<sup>19</sup> Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016); Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America*. (Oxford and New York: Oxford University Press, 2014).

<sup>20</sup> See this dissertation’s bibliography of works in legal liberalism that barely touch on crime and punishment.

<sup>21</sup> Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven and London: Yale University Press, 1998); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York: Oxford University Press, 1998); Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner-Era Police Powers Jurisprudence* (Durham and London: Duke University Press, 1993); Morton Horowitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford and New York: Oxford University Press, 1992). Jessica Wang has located “legal pragmatism” in the rising administrative state with profound ramifications for “New Deal liberalism’s intellectual underpinnings, as well as the general place of law in the history of American state-building.” Jessica Wang, “Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism,” *The Journal of Policy History* 17, No. 3, 2005, 258.

<sup>22</sup> Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: W.W. Norton, 2015), 218, 221.

<sup>23</sup> James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2013), 50.

<sup>24</sup> Kennedy, *Freedom from Fear*, 893, 912.

account lacks deep reflection of the impact of Roosevelt's domestic policies on the wartime security state. Katznelson argues that in 1940 the Bureau's field offices "quickly shifted emphasis from crime fighting to internal security," rather than seeing the unification of these functions both before and after Pearl Harbor.<sup>25</sup> FBI historian Athan Theoharis approaches the war on crime and security state as crucial but largely separate Roosevelt-era FBI stories, countervailing to rather than constitutive of the story of liberalism.<sup>26</sup> O'Reilly also implicitly reads the national security state outside of New Deal liberalism by separating FDR from the "conservative FBI director," who aside from "the New Deal crime-control" found "little else about the Roosevelt administration." O'Reilly suggests that the coercive scope of Roosevelt's FBI expansion against crime raises questions about national security and public relations, without exploring how the security state should inform our understanding of the New Deal's larger role in creating the domestic state that arises from World War II.<sup>27</sup>

In sum, the literature conveys the observation that the activist liberalism of the New Deal fueled criminal-justice and security-state powers, but scholars have said less about the reciprocity in this relationship and the role of domestic coercion in building New Deal liberalism. In Margot Canaday's study of the construction and criminalization of homosexuality under the New Deal state, in peacetime and at war, the author laments that "[h]istorians, for their part, have responded to the vastness and complexity of the state (until fairly recently) by not writing about the state at all."<sup>28</sup> Twenty years earlier, Claire Potter asked "historians of the New Deal to consider the crucial importance of enforcement to other statist agendas of the period."<sup>29</sup> This open-ended question has remained unanswered.

My answer to Potter and Canaday, and to the immense literature on which my project relies, is that the war on crime was vital to legitimating federal authority and building the New Deal state. The New Deal war on crime thus played an integral role in three stories central to the development of modern American governance. In the first story the New Deal significantly guided the institutional development of American law enforcement. The second story is a larger political tale about the transformation of government, driven by a new war on crime coalition and an enduring consensus about the legitimacy of federal power—finally ending the crisis of legitimacy stretching deep into the nineteenth century. The third story relays how the political and institutional development of the war on crime transformed American liberalism as both an ideological vision and program.

At the most basic level, my first story argues that the New Deal in crime control was not just a "radical moment," to borrow Katznelson's phrase, but an enduring departure.<sup>30</sup> Modern federal firearms and drug control traces back to the 1930s. Under Roosevelt, economic regulation and criminalization converged to set new precedents in pursuing what later became known as white-collar crime. The FBI gained new powers and prestige, and stamped its imprimatur on police departments throughout the country. Some experiments anticipated future developments, even if the intervening decades obscured the continuities. New forms of incarceration enjoyed their

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<sup>25</sup> Katznelson, *Fear Itself*, 158, 324–334.

<sup>26</sup> Theoharis, *The FBI & American Democracy*.

<sup>27</sup> O'Reilly, "A New Deal for the FBI," 640.

<sup>28</sup> Margot Canaday, *Straight State* (Princeton and Oxford: Princeton University Press, 2011), 5.

<sup>29</sup> Potter, *War on Crime*, 200.

<sup>30</sup> See Katznelson, *Fear Itself*, 234–238.

debut. The prison population grew, even as crime fell, reaching a per capita peak at the end of the 1930s unseen again until the late 1970s. The federal government assisted states and localities in building jails and prisons while seeking to understand and defend their methods of parole. The New Deal decade as much as any other revolutionized the machinery of American law and order.

My second story is more ambitious, a political history of the legitimation, expansion, and transformation of national authority. After generations of controversy and instability, the New Deal government finally constructed a permanent law-enforcement apparatus. Without broad support for basic domestic law-and-order powers, and wide acceptance of the New Deal's efficacy in managing crime, the Roosevelt administration would fail in the face of the distrust and skepticism that had afflicted the Republican governments in the 1920s, and similarly lack the political leeway to act boldly in domestic policy. Amidst the failures of Prohibition and the suffering of the Depression, Roosevelt faced the challenge of unwinding liquor control without undercutting the appeal to greater public trust in federal institutions, all the while managing intense and conflicting political pressures from all sides. Legitimizing the national war on crime meant cooperating with the states, civic society, and international community. The Roosevelt administration successfully appropriated and redefined progressive criminology to accommodate the widest spectrum of practitioners and reformers. The administration achieved not only this, but it salvaged the instruments of repression, produced out of the contingencies of World War I and the highly contested program of prohibition, and repurposed them for a new, broadly accepted and sustainable war on crime. This required approval—across society, the state governments, and legal community—for a reinterpretation of constitutional norms to enable vast new powers in crime and drug control. The most radical enduring structural change was this radical transfiguration of American constitutional order around a new settlement between the federal and state governments, which I call war on crime federalism.

Given the institutional jealousies and common distrust of federal power, this was a most impressive feat, the full significance of which has been overlooked. This accomplishment relied on the New Dealers' nurturing of an informal war on crime coalition, which transcended partisan, regional, and ideological lines to accommodate both progressive and conservative crime-fighting priorities at all levels of government. This coalition included Republicans and Democrats, prohibitionists and their opponents, tough-on-crime conservatives and progressive idealists, practitioners and academics, national and local law enforcers, industrialists and labor activists, white supremacists and African-Americans. Roosevelt and Attorney General Homer Cummings successfully pursued a pragmatic synthesis of humanitarian reformism and Hobbesian state violence. The jurisdictional jealousies that had previously plagued state and local governments, federal authorities, and Treasury and Justice officials, gave way to a new cooperative settlement in which all instruments of crime control had an expansive role to play, even as they enjoyed a new deference toward one another. By the late 1930s those who had served the interwar cause of repressing dissidents, and the dissidents themselves, could join in the hopes that the instruments of domestic control would in the end serve the public good.

This second story stresses an anomalous moment in racial politics. While Katznelson emphasizes the Jim Crow Democrats in the New Deal coalition, I consider their role in the war on crime coalition. While they hoped the federal government would leave intact state-level racial control, African-Americans and racial liberals hoped it would intervene, particularly against lynching, and effectively fulfill the promises of Reconstruction. The jurisdictional ambiguities of war on crime federalism nurtured both groups' conflicting hopes in driving the expansion of

government power at all levels. In the short term and in the longer term African-Americans would bear the brunt of this carceral compromise, but the prospect of civil rights enforcement complemented conservative support for repressive state mechanisms to allow the war on crime to develop into a security state.

A few words on terminology should clarify the conceptual stakes of the New Dealers' relationship to the war on crime coalition. The term *New Dealers* takes on a rather conventional meaning in this dissertation. It refers to those who shared in Roosevelt's program of restructuring the political economy of the United States. This includes the top officials in his administration, especially those with a direct role in 1930s economic policy, as well as the local and state politicians, journalists, and activists who found themselves in solidarity with New Deal reforms.<sup>31</sup> Of course these reforms varied in detail and even in their underlying governing rationales, but a discernable family resemblance nevertheless emerges among those who championed the New Deal as a general approach to reform. As a group, the New Dealers overlapped with the war on crime coalition, but there were surely members of one camp who did not fit in well with the other. As the following chapters will show, FBI chief J. Edgar Hoover, Narcotics Bureau chief Harry Anslinger, and many of the legal minds associated with the American Bar Association were either indifferent or hostile to New Deal economic reformers. These non-New Dealers and anti-New Dealers were nevertheless key personalities in the war on crime coalition. Raymond Moley, one of Roosevelt's main advisers in the first term, went from being an archetypal New Dealer to being a famous anti-New Dealer, yet his loyalty to the war on crime coalition remained steady throughout the 1930s. On the other hand, there were some among Roosevelt's top brass who had little involvement in the war on crime directly.

But this dissertation emphasizes the overlap between the New Dealers and the war on crime coalition, for several major reasons. Many top officials in shaping the New Deal agenda in political economy, even narrowly defined, had important institutional roles in the war on

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<sup>31</sup> In 1958, Arthur M. Schlesinger, Jr., writing about Roosevelt's First 100 Days, posed the question, "Who were the New Dealers?" His answer focuses on the policymakers in Roosevelt's inner circle. They came from various class backgrounds but "were predominantly middle class," boasted geographical diversity but were mostly college educated with experience in city government. They were "generalists" and "represented divergent and often clashing philosophies" from "laissez-faire liberalism" and the "agrarian tradition" to "trust-busting liberalism" and "Theodore Roosevelt-Herbert Croly Progressivism." While Schlesinger does not provide much on crime and punishment, his casting of the New Dealers as those who formulated and advanced Franklin Roosevelt's agenda through governing experimentation mostly suffices, although I use a slightly broader definition to include local activists and thinkers in solidarity with Roosevelt's general agenda, a usage self-applied by many since the 1930s. Schlesinger, *The Age of Roosevelt: The Coming of the New Deal, 1933-1935* (Boston and New York, Houghton Mifflin Company, 1958), 18-19. As for the question of what constituted the *New Deal*, that is an argument among historians into which this dissertation seeks to intervene. At any rate, the question must contend with the fact that Roosevelt advanced the term to describe his agenda on the campaign trail, and as one reference book, drawing on Schlesinger, helpfully summarizes the matter, the term referred at the time to Roosevelt's "political and economic policies" and has since "come to symbolize Roosevelt's political philosophy as well as the role of the Democratic party and the federal government in dealing with the Great Depression." James S. Olson, editor, *Historical Dictionary of the New Deal: From Inauguration to Preparation for War* (Westport and London: Greenwood Press, 1985), 369. Olson's volume characteristically traces the term back to Stuart Chase, an economist with Georgist and Fabian influences whose 1932 tract on political economy, *A New Deal*, foreshadowed the kind of program associated with Roosevelt. Chase's book did not engage the question of crime much, but did lament the political graft that protected "speakeasies" and found that addressing racketeering might require that government "modify Prohibition." Chase, *A New Deal* (New York: The MacMillan Company, 1933), 14, 36.



crime—Roosevelt himself, Homer Cummings and Roosevelt’s other attorneys general, Treasury Secretary Henry Morgenthau, as well as politicians at the local level. Moreover, as Roosevelt’s war on crime developed in relation to New Deal liberalism, the administration elevated progressive elements of the criminological community so as to bring together the policy agendas of social welfare and social control. Finally, because the state-building exercises in crime fighting and in political economy fueled one another, those who fell into one camp became invested in the other camp even they had no such intentions. J. Edgar Hoover and Anslinger, for example, were thus important to constructing the New Deal state regardless of their own political opinions on issues outside of their own policy affinities with Roosevelt.

While my second story concludes the multi-generational predicament of political authority, my third story reveals the origins of modern American governance as guided by a new kind of liberalism. Its transformation over the twentieth century makes liberalism both important and difficult to define precisely or reductively. That Roosevelt set out to define (or redefine) a modern program and creed of American liberalism is a relatively uncontroversial claim.<sup>32</sup> The liberalism of the late-nineteenth century, centered on free labor, contractual relations, private property rights, and constitutional subsidiarity, lost its dominance in the early-twentieth century, during which Roosevelt came of age. In the Progressive Era, to oversimplify, the dominant political ethos in both major political parties had left behind Gilded Age liberalism and adopted an approach more comfortable with domestic and international intervention. This progressive liberalism was still liberalism in that it eschewed either radical or aristocratic class interests in favor of a middle-class urban reform sensibility, and it recognized limits to power, particularly on federal authority, as well as many of the traditional rights of the liberal individual. The classical liberalism of the last century still existed, arguably in an even more unapologetically contractual form, in the Supreme Court during its so-called *Lochner* era. The 1920s Republicans in a way restored an older liberalism when compared to the peak of Woodrow Wilson’s peacetime and wartime governing experiments, while accommodating the nationalist programs of immigration control and protectionism and enforcing, however unevenly, alcohol prohibition—a policy that was perhaps conservative in practice even if it was progressive in aspiration. In response to all the frustrations with governance, particularly in the midst of the

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<sup>32</sup> One potential source of disagreement is whether Roosevelt’s agenda amounted to undertaking the definition of liberalism, rather than its redefinition, at least in the American context. As Helena Rosenblatt explains in her sweeping account of western liberalism reaching back into the early modern era and before, Roosevelt succeeded in popularizing liberalism as an American creed, one that supported government intervention, shaped U.S. domestic policy, and in particular defined the program of the mid-century Democratic Party. Rosenblatt sees Roosevelt’s liberalism as similar to British Liberal Party politician William Beveridge, architect of the postwar British welfare state, and notes that the controversy over the authentic legacies of liberalism persisted into the 1940s and beyond. On the one hand, some continued to defend the *laissez-faire* brand as the genuine article, while on the other hand John Dewey argued that between the two dominant “streams” of liberalism—the humanitarian interventionist strain and the *laissez-faire* pro-business strain—the latter was decidedly removed from any *American* vision of liberalism. Helena Rosenblatt, *The Lost History of Liberalism: From Ancient Rome to the Twenty-First Century* (Princeton and Oxford: Princeton University Press, 2018), 361–63. Roosevelt was, in any event, successful in shaping American and modern conceptions of liberalism. John Rawls, likely the key philosopher defending the postwar welfare liberal vision within the Atlantic world, emphasizes the role of “public reason” in advancing the “higher law” demanded by the modern liberal democratic cause, which in the United States he identifies as having major flashpoints during the American Revolution, Reconstruction, and the New Deal. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 333–34.

Great Depression, Roosevelt aimed to turn his Democratic Party and the country at large toward a new liberalism, much more favorable toward broadly activist government than nineteenth-century liberalism or 1920s conservatism while more sensitive to the practical limits of power than either the Wilsonian progressives or the unbridled left- and right-collectivisms that had come to define interwar politics throughout much of the world.

Focusing on the state's criminal justice and law enforcement powers sheds new light on the New Deal's transformation of liberalism. Having emerged through multiple transformative challenges—the unrest of the Gilded Age, the temptations of middle-class progressive reformism, the paradoxes of state power revealed in the repression, nativism, and Prohibition arising out of World War I—American liberalism itself was in crisis when Roosevelt took office consciously hoping to reclaim and redesign it for a new age. The tensions within classical liberalism and progressivism yielded to logistical and political demands imposed by the war on crime coalition's strategic and policy agenda. Adherents of idealism and amoral power politics converged and criminal procedure brought New Deal liberals and conservatives together like nothing else until the 1940s threats to national security. The infamous bipartisan crime-fighting consensus thus predated the conventionally accentuated postwar period. Blurring the lines between domestic policy and national security, the New Deal produced a stable war on crime from the beleaguered militaristic remnants of World War I—J. Edgar Hoover's policing machinery, surveillance and carceral systems designed for enemies of the state, Treasury Department powers that harmonized regulation and criminal justice—and then again transfigured that sustainable war on crime into a permanent security state. An ever-expanding power to suppress crime through a remodeled federalism was thus baked in to the defining contours of modern liberal governance. Although the inextricable ties between welfare and warfare have received some attention, it was the war on crime that consummated their domestic fusion in their most precarious years. This domestic fusion served the New Dealers as they shepherded the messy interwar enforcement apparatuses safely to World War II, during which this stabilized infrastructure of repression became a permanent fixture of the American landscape. The experimental tendencies of war on crime liberalism, a synthesis of conservative and reformist elements, eventually yielded a more stable program in the twilight of the 1930s—a political program, comprising both vision and pragmatic governing temperament, I call security-state liberalism.

In sum, the New Deal administration, through its war on crime coalition, finally achieved a broad social legitimacy for the federal government's core enforcement powers, and their unprecedented campaign against lawbreakers radically reshaped law enforcement, federalism, liberalism, and thus the American state. I make these arguments in the history told in the following chapters. Every chapter addresses aspects of all three of my stories—the transformation of law enforcement, the securing of national legitimacy, and the development of liberalism—but each chapter has its own thematic as well as chronological emphasis.

Chapter One surveys the main predicament for national enforcement authority from the end of the Civil War to the eve of the New Deal. A broad overview establishes the stakes for what the New Dealers inherited in 1933. After the national unification of the 1860s, the United States suffered a crisis of legitimacy, rooted in the contested relationship between the federal and state governments and the refusal of many Americans to submit to the most basic national powers of law enforcement. For seven decades, national leaders, representing different strains of American

liberalism, tried and failed to legitimate national authority. Americans mobilized on the issue of opposing lawlessness, but there existed no broad consensus about its particulars or the remedy. The crises of Reconstruction and the Gilded Age can be understood through this central problem of law enforcement, and Progressive-Era reformers failed to create a coherent crime fighting program that brought the grassroots behind a national vision. The contradictions of federal legitimacy hit their wartime peak in World War I and their peacetime crescendo with Prohibition, culminating in the domestic failures of Herbert Hoover's presidency.

In their first two years in national office, Roosevelt and Attorney General Homer Cummings worked to gracefully end alcohol prohibition while escalating a new war on crime. These efforts find their narration in Chapter Two. In 1933, as Roosevelt took power, the nation was in the throes of a kidnapping and organized crime panic, and fears about lawlessness inspired calls for extreme measures, particularly among the political fringes. Roosevelt and Cummings navigated this volatile political climate, built a broad war on crime coalition, stabilized relations among previously competing agencies and between the federal and state authorities, and pushed an unprecedented crime control program that mobilized physical resources, pushed the boundaries of legal practice and interpretation, streamlined due process protections, and blurred the lines between the military and domestic state, even as it eschewed the most radical proposals that urged a total retreat from liberalism. More federal criminal statutes were passed in 1934 than in all the previous years. By the end of 1934, the material aggrandizement was in evidence, a fact touched on by the literature. But just as important, by the end of 1934 New Deal liberals had succeeded in legitimating national authority and transforming federalism where previous liberals—the Reconstructionists, classical liberals, progressives, and prohibitionists—had failed.

Whereas the Progressives had failed in tethering social activism to the national state, the New Dealers found their discursive tool in the idea of “crime prevention.” Chapter Three focuses on New Deal criminology, and how the Justice Department brought progressives and conservatives together behind a new, almost unbelievably ambitious vision for national crime fighting. The Justice Department laid claim to the idea in part to legitimize its role as a leader in social change. Its version of crime prevention accommodated progressive values that were skeptical of punishment and repression, but also held the capacity to justify repression on a vast scale. By the end of the 1930s, the ambitions of crime prevention, with all its contradictions, had prevented its full institutional actualization. But it had done its work as the intellectual currency that connected the Justice Department and Treasury Department to academia, social reformers, the welfare state, and law enforcers.

New Deal penology and its obstacles drive the discussion in Chapter Four. In building the modern carceral state, the Roosevelt administration navigated liberalism and federalism. In effect, a new carceral liberalism reconciled the previous strains of penological reformism with immediate and sometimes conflicting political demands. While scholars often detect a tension between the 1930s rise of incarceration and new liberal approaches to parole and probation, in fact these strains arose symbiotically and were defended from the same principles. Although the priority of maintaining order through prison policy bridged the Herbert Hoover and early Roosevelt years, the development of Alcatraz broke new ground in unforgiving discipline. Meanwhile, Cummings and his subordinate Justin Miller undertook a deliberate effort to shift the national debate toward rehabilitation with their Survey of Release Procedures—a joint endeavor by the Justice Department and Works Progress Administration whose stumbles revealed the tensions in the New Deal war on crime while nevertheless strengthening relations across

government agencies. The WPA and welfare state also helped in building jails and prisons, and by the late 1930s such officials as Prison Bureau Director Sanford Bates were arguing for rehabilitation and expanding incarceration as complementary.

Among the most lasting legacies of the 1930s was the prohibition of marijuana and the established permanence of Harry Anslinger's Narcotic Bureau. This development is central to the origins of the modern war on crime but is usually told as a story separate from the New Deal. Chapter Five explains how Anslinger fit in the New Deal war on crime coalition, and how liberal values of humanitarianism and especially internationalism activated the Treasury Department's law enforcement powers in the precarious years after alcohol prohibition and bridged the chasm between conservative drug warriors and New Deal liberals, who oversaw drug war activities even beyond Anslinger's direct control. While first leveraging international commitments toward state-level criminalization efforts, Anslinger and the New Dealers eventually produced an outright national ban on marijuana, a crucial stepping stone in the legitimation of national power and the reinterpretation of constitutional norms.

The legal conflicts between Roosevelt and the conservatives are the stuff of legend. A showdown over packing the Supreme Court in 1937 is the typical narrative climax, yielding a complacent judiciary and a less radical Roosevelt as the concluding synthesis. On legal issues of crime and punishment, however, cooperation and agreement rather than conflict characterized the decade. Chapter Six explores the consensus around criminal procedure and constitutional police powers that served both New Deal liberals and the loudest New Deal critics within the legal community. More lastingly important in terms of legal norms, chapter five is the most focused on federalism in legal and constitutional discourse. A broad agreement over a new war on crime federalism, where both federal and state officials could flex muscles in cooperation rather than in zero-sum rivalry, revolutionized constitutional interpretation, advancing the frontiers of national power as much as any project of social welfare or regulation.

In the years before Pearl Harbor, a security state arose out of Roosevelt's war on crime. This development, described in Chapter Seven, arrived symbiotically with the transformation of war on crime liberalism into security state liberalism, as a bipartisan politics of repression, in both national and local venues, coalesced with anxieties about international affairs to produce a new liberal consensus around state power. From 1939 through 1941, the institutional crescendo was the gestation of war on crime federalism into security state federalism, guided by Frank Murphy, Robert Jackson, and Francis Biddle, the Attorneys General who succeeded Cummings. While security-state liberalism came to define the governing ethos, the structure of its implementation became security-state federalism. The FBI linked the national defense establishment to local law enforcement. Hardened boundaries of the law-abiding and criminal, the patriotic and subversive, allowed for a more inclusive and yet uncompromising security-state coalition that eventually included stalwarts of radical labor and anti-communist FBI leaders, who now condemned lawlessness both within and outside the infrastructure of repression.

Chapter Eight examines World War II as the great trial for this new security state, in both its structural and ideological development. The federal government became even more involved in assisting local police in rather mundane offenses. The new security-state touted, with some credibility, more devotion to lawful process than what had characterized World War I. As the perverse apotheosis of both security-state liberalism and security-state federalism, Japanese Internment demonstrated the new consensus and jurisdictional capacity following a decade of

New Deal mobilization against lawlessness, as well as the limits of such mobilization when it comes to questions of civil liberties and justice.

This work ends with a short conclusion on the transformative impact of the New Deal war on crime on liberalism and the American state. Far from contradicting the key findings in the impressive literature depicting a profound importance of law enforcement and New Deal liberalism in producing the modern state, this dissertation aims to persuade the reader that we have underestimated their impact

## Chapter 1

### *The Most Lawless Nation*

On a Wednesday night in the middle of February 1933, Giuseppe Zangara was in Miami to murder Franklin Roosevelt. He missed the president-elect but shot five people, fatally striking Chicago Mayor Anton Cermak. Zangara came from New Jersey, carrying a newspaper account of the McKinley assassination, eager to “kill every President. . . kill them all. . . kill all the officers,” as the police later reported. Keeping his composure during the attack, Roosevelt instructed the Secret Service to intervene and protect Zangara’s life from the violent mob that immediately pounced on him.<sup>33</sup>

Roosevelt became president the next month amidst an epidemic of lawlessness and a crisis of legitimacy. Prohibition had brought black markets, disrespect for the law, and corruption, and a well-publicized rise of kidnappings and bank robberies plagued the landscape of Depression-era America. But the outrages of 1933 obscured a much deeper crisis, one of authority and popular ideology. The federal government’s domestic authority turned on its institutional and political capacity to enforce the law and punish lawbreakers. Seemingly intractable conflicts over this authority had profoundly shaped American politics and government for all of living memory. Roosevelt had won in a landslide, carrying a stronger majority than any Democrat ever had. But for him to govern, especially with an ambitious domestic reform agenda, he would have to address this crisis of authority. He would have to navigate the nation between the criminality that the public feared and pressure for a lawless overreaction.

Historians have long taken interest in the struggles over political and legal legitimacy that peaked with Prohibition. They largely recognize that Roosevelt’s promise to rein in corruption and lawlessness by siding with the anti-prohibitionists helped him win in 1932. But generally, scholars have not recognized the full weight of the crisis of legitimacy that Roosevelt inherited, the response to which not only shaped New Deal politics but enabled the New Deal state to flourish. Looking further back, the predicament of social order animates a lot of the scholarship on Progressivism, the problem of corruption defines work on the Gilded Age, and the core struggle over jurisdictional legitimacy frames much of the scholarly discussion of Reconstruction.<sup>34</sup> Less often recognized is the sum of the parts—the great intergenerational political struggle over imposing order that Roosevelt inherited in 1933.

Roosevelt’s domestic agenda for both crime and the economy envisaged a federal role that had to contend with this longstanding institutional and cultural instability. More specifically, the New Deal relied on a broadening of federal enforcement power. Roosevelt’s coalition and

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<sup>33</sup> “Assassin Shoots 5 Times,” *New York Times*, 16 February 1933.

<sup>34</sup> The emphasis on social control is a staple of the historiography on the Progressive Era, beginning with Robert H. Wiebe, *Search for Order* (New York: Hill & Wang, 1966), who stressed the Progressives’ concern that ““ruthless men had usurped the government and were now wielding it for their private benefit” (77). On the Gilded Age, Richard White urges a return to the classical emphasis: “Historians once embraced corruption as diagnostic of [the Gilded Age], but for the past half century they have downplayed its importance. They have been wrong to do so.” White, *The Republic for which it Stands: The United States During Reconstruction and the Gilded Age, 1865–1896* (New York: Oxford University Press, 2017), 2. On Reconstruction, Laura F. Edwards frames the entire legal history in terms of the nationalization of liberalism and liberal rights in *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015).

agenda finally appeared to address the America's perceived structural defect of lawlessness in a way that served a workable national program. A look to the generations of struggle against the feared problem of lawlessness will sharpen our appreciation of his predicament's significance to American politics and governance.

### The Limits of Conquest and Liberalism

In the late-nineteenth century, federal law enforcement provoked continuous national contention. The obstacle to a lawful national order often appeared in the specter of lawlessness. Starting in the immediate aftermath of the Civil War, the trope of "lawlessness" arose in national narratives about the frontier, and became projected eastward to envelop the country. Prompted by the 1864 Sand Creek Massacre in Colorado, the federal Indian Peace Commission framed the atrocity less as a matter of volunteers operating under the auspices of military authority and more as a product of "aggressions of lawless white men."<sup>35</sup> In the many struggles for national authority that followed, this trope of lawlessness took many forms. It included those at Sand Creek who vigilantly advanced the white supremacist cause outside the formalities of federal operations. It included the Indians themselves, whose attempts to maintain sovereignty posed an obstacle to the assimilationist attempts of the federal state. Through Reconstruction and the Gilded Age, the national press described as lawless every objectionable group, every obstruction to the rational, continental production of order. *New York Times* readers learned of Georgia's "lawless Negroes" in 1869 and Harlem's "lawless Italians" two decades later.<sup>36</sup> In the interim they read horror stories of "lawless strikers," "lawless gamblers," "lawless coal miners," and "lawless Chinese."<sup>37</sup> In 1874 the *New York* paper condemned "lawless Kentucky" and in 1889 the *Los Angeles Times* warned of "lawless Texas."<sup>38</sup> Governments were not immune from the problem, from the "lawless law" of Southeast Asian despotisms to New York's own "lawless" state senate.<sup>39</sup>

The feature unifying all these phantoms of "lawlessness" was their function in obstructing an orderly and stable governing rule. Some of these threats were more imagined than others, and the project of suppressing them carried complicated and conflicting social and moral implications. Although concern about lawlessness did not correspond perfectly with quantifiable violent crime rates, the more qualitative contrast between the legitimacy of enforcement and the problem of lawlessness shaped the contours of national politics.<sup>40</sup> *Lawlessness* could thus appear a much

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<sup>35</sup> See Kerry R. Oman, *The Beginning of the End the Indian Peace Commission of 1867–1868* (Great Plains Quarterly, 2002): 35–51.

<sup>36</sup> "Lawless Negroes," *New York Times*, 4 January 1869; "Lawless Italians," *New York Times*, 12 August 1889.

<sup>37</sup> "Lawless Strikers," *New York Times*, 28 May 1883; "Lawless Gamblers," *New York Times*, 21 April 1883, "Lawless Coal Miners," *New York Times*, 21 March 1883; "Lawless Chinese," *New York Times*, 31 July 1885.

<sup>38</sup> "Lawless Kentucky," *New York Times*, 6 September 1874; "Lawless Texas," 20 December 1889.

<sup>39</sup> "Lawless Law," *New York Times*, 10 January, 1886; "Censured by Lawless Senate," *New York Times*, 21 January 1892.

<sup>40</sup> In *American Homicide* (Cambridge, MA: The Belknap Press of Harvard University Press, 2009), Randolph Roth finds that interracial violence rose during early Reconstruction (343), but homicides fell in much of the South as well as the North and West after Reconstruction (411). Some of the most dramatic change was in the Southwest in the late nineteenth and early twentieth centuries (387). In Los Angeles County, homicides plummeted from 198 per 100,000 adults per year in the late 1860s and early 1870s down to 23 per 100,000 in the last two decades of the nineteenth century (403). Although Roth argues for a correlation between lower homicide rates and trust in government, the reduction in homicide rates from Reconstruction to World War I, did not shield the legitimacy of national enforcement against constant challenge.

greater predicament, even as a material barrier to governance, than it actually was. But even an unwarranted perception of lawlessness mattered to the stability of democratic government, and certainly to an expansive national state whose leaders sought enough domestic legitimacy to implement ambitious reforms. Indeed, as the national aspiration to defeat lawlessness served the ideological construction of lawful order, law itself became defined in terms of its opposite that it confronted—lawless resistance. Resistance arose in different forms—vigilant defense of Indian sovereignty, terroristic overthrow of Union authority, and violent labor strikes. Having faced recalcitrant Southerners and even Northerners through the Civil War, the United States encountered continuing intransigence during its military domination of the South and conquest of the western plains.

The American federal republic's attempt to achieve continental mastery, in contrast to contemporaneous nationalizing efforts in Germany, Italy, and elsewhere, had to overcome its peculiar constitutional legacy of enumerated national powers. Facing new predicaments of rule, Reconstruction and Gilded Age officials sought different institutional arrangements for enforcement, particularly criminal enforcement. Any long-term stability in this enforcement would require sufficiently broad ideological support. Out of the Civil War arose a liberal nationalism dedicated to free labor, industrial markets, a broader scope of individual rights and social and political equality, with greater federal oversight to protect these values against state government abuse without fully displacing subsidiarity. Perhaps in part because the national goal of taming lawlessness rested on contradictory premises, this liberalism failed in the ideological project of legitimating national authority. Through the end of the nineteenth century no ethos adequately united Americans behind the effort to conquer lawlessness and tame the resistance to centralized power.<sup>41</sup>

Criminal law was at the heart of the struggle over Reconstruction. Attempts to give teeth to emancipation immediately found resistance, often expressed in jurisdictional conflict over enforcement power. Alongside the dislocations of war came a surge in violent and property crime, which white Southerners seized as an opportunity to reassert their local authority through the discipline of criminal justice.<sup>42</sup> Southern states reasserted white supremacy through the notorious Black Codes of 1866, employing criminal law jurisdiction to reconstitute the apartheid state that previously relied on slavery. Even in conceding some basic rights to judicial process, including the right to testify in cases involving black Americans, the southern states sought to reclaim criminal legal processes. More ominously, the codification of new offenses and new means of enforcement undertook to reclaim the racial order. The Mississippi penal laws targeted African Americans implicated in carrying firearms, trespassing, engaging in “mischief” or “insulting gestures,” speaking seditiously, or preaching without a license. The state's

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<sup>41</sup> Randolph Roth argues that unification reduced homicide rates in Italy and corresponded to lower arrest rates in Germany in *American Homicide*, 298. Into the twenty-first century, centralization of policing tended to be more elusive in the United States than in civil law countries. See Cliff Roberson and Dilip K. Das, *An Introduction to Comparative Legal Models of Criminal Justice* (Boca Raton, London, and New York: Taylor & Francis, 2016), ch 3. On the sweep of class resistance in the nineteenth century see Steve Fraser, *The Age of Acquiescence: The Life and Death of American Resistance to Organized Wealth and Power* (New York: Little, Brown and Company), part 1.

<sup>42</sup> “In the aftermath of abolition, as under slavery,” writes Eric Foner, “planters complained of widespread theft of blacks.” Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper, 2002 [1989]), 202. On the Southern perceptions of black criminality that had grown out of the war also see Leon F. Litwack, *Been in the Storm So Long* (New York: Vintage, 1980), 267–72.



apprenticeship law charged “sheriffs, justices of the peace, and other civil officers” with the task of tracking violators of the apprenticeship law, and any African-American insufficiency tethered to a white employer was subject to laws against “vagrancy.”<sup>43</sup>

The Republican Congress responded, first with statutory and then constitutional reforms, many aimed at transforming criminal jurisdiction. The 1866 Civil Rights Act sought to impose a baseline equality of access to criminal courts, making U.S. District Courts responsible for adjudicating “all crimes and offenses” against the Act and establishing a judicial uniformity of “civil and criminal matters” that had previously been left to the states.<sup>44</sup> As the Black Codes mounted, the Republican Congress pursued Radical Reconstruction. The Reconstruction Acts divided the South up into five military districts, to be administered by the federal government, and the Habeas Corpus Act of 1867 empowered the federal judiciary to protect due process rights. Most important, the Fourteenth and Fifteenth Amendments of the Constitution formally inserted the federal government between the states and its inhabitants in the name of protecting civil rights. Federal troops secured the right of black Americans to vote, among the biggest social consequences of which was the election of black sheriffs throughout much of the South. In the long term, the Fourteenth Amendment promised to constrain the criminal justice powers of the state governments, at least insofar as they worked to “deprive any person of life, liberty, or property, without due process of law.”<sup>45</sup>

But in the shorter term, the federal government lacked the resources to sustain such safeguards of liberty—or to do much in the realm of law enforcement at all. Immediately after the war, such high-profile federal trials as that of the Lincoln assassins resembled wartime military commissions in both their institutional makeup and their procedural expediency. It was not until the summer of 1870, months after the ratification of the Fifteenth Amendment secured black men’s voting rights, that Congress created an independent Department of Justice to manage the increasingly complicated feat of federal litigation. Justice was still barred from conducting basic investigations and arrests.<sup>46</sup>

Rather than a purportedly peaceful process of jurisdictional competition, diffuse violence characterized the struggle over civil rights in the South. White supremacist terror inspired the Klan Acts of 1870 and 1871. These laws empowered U.S. marshals to protect the integrity of elections against Klan violence. President Ulysses S. Grant identified “lawless and disaffected persons” as responsible for “persistent violations of the rights of citizens,” and urged local law enforcement to assist the national effort at imposing order.<sup>47</sup> The third of the enforcement acts empowered the president to suspend habeas corpus, which Grant leveraged to effectively smash the Klan in South Carolina.<sup>48</sup> By this time, however, several states had effectively fallen to the violence and intimidation of white Democratic “redeemers.”<sup>49</sup> Having pushed the Union out,

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<sup>43</sup> Foner discusses the pursuit of accused thieves in *Reconstruction*, 202. Mississippi Black Codes (1866).

<sup>44</sup> 1866 Civil Rights Act, 14 Stat. 27–30.

<sup>45</sup> Fourteenth Amendment, <https://www.loc.gov/law/help/statutes-at-large/41st-congress/session-2/c41s2ch150.pdf>

<sup>46</sup> Joan M. Jensen, *Army Surveillance in America, 1775–1980* (New Haven and London: Yale University Press, 1991), 41.

<sup>47</sup> Ulysses S. Grant, Proclamation 199, 3 May 1871, APPUCSB.

<sup>48</sup> Allen Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* (Baton Rouge: Louisiana State University Press, 1971).

<sup>49</sup> Eric Foner has documented the importance of black law enforcement officials during Reconstruction. They briefly dominated Beaufort, South Carolina’s police force and at least 41 black sheriffs served throughout the South. Eric

Mississippi reasserted its criminal jurisdiction in the form of draconian laws against such offenses as minor theft, swelling its prisons with black men it leased out as forced laborers.<sup>50</sup>

The legitimacy of Grant's presidency endured scrutiny in the North as well, particularly from urban Democrats, as domestic politics focused on alleged corruption and lawlessness. Nowhere were dueling accusations of corruption more potent than in New York, where Boss Tweed and Tammany Hall controlled the powerful local Democratic Party, and conflict with the Republicans often expressed itself in violence, most notably a riot in 1871.<sup>51</sup> Bourgeois Republicans built a compelling narrative about Tammany corruption, only to have the charge flung back at them, targeting the notorious corruption of the Grant administration.<sup>52</sup>

In the highly partisan 1870s, economic dislocation also conspired with racial resentment to stoke distrust in federal power. Violent resistance and the Panic of 1873 weakened Republican domination, and acts of terror peaked that same year with the Colfax massacre, when white Southern Democrats overpowered Republican freedmen and state militia, murdering 150 black men in Colfax, Louisiana.<sup>53</sup> Such terror forced federal retrenchment in the mid-1870s, first in an 1875 Supreme Court decision and then the next year in the presidential election. In *United States v. Cruikshank*, the Court considered the federal indictment of three for the Colfax massacre under the 1870 Enforcement Act, which had found that the white mob had denied the Colfax victims of their First Amendment political rights and their Second Amendment right to keep and bear arms.<sup>54</sup> The Supreme Court, however, decided that the Fourteenth was meant to restrain state and not private actors, and so overturned the three indictments in the Colfax massacre.<sup>55</sup> The next year, Rutherford Hayes barely won his 1876 election against Democrat Samuel Tilden by promising to end Reconstruction and thus rolling back federal enforcement power. The troops withdrew from their occupation of the South, signaling a federal surrender to the jurisdictional supremacy of the Southern states, at least as it concerned African-Americans, and reinforcing their claim to criminal justice jurisdiction. While still vying for continental mastery, the federal withdrawal from criminal justice authority over racial injustice marked the final end of Radical Reconstruction.

Military conquest rests on social dynamics fundamentally different from those that undergird sustainable civil law. If legal and political power arise from a combination of coercion and consent, military force privileges a reliance on coercion whereas civil law requires consent. The

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Foner, *Freedom's Lawmakers: A Directory of Black Officeholders during Reconstruction*, revised edition (Baton Rouge: Louisiana State University Press, 1996 [1993]), xvii, xxvii.

<sup>50</sup> Nicholas Lemann, *Redemption: The Last Battle of the Civil War* (New York: Farrar, Straus and Giroux, 2006), 184.

<sup>51</sup> For more on fear of disorder in shaping bourgeois liberalism see Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896* (Cambridge: Cambridge University Press, 2001).

<sup>52</sup> Terry Golway, *Machine Made: Tammany Hall and the Creation of Modern American Politics* (New York: WW Norton, 2014), 95, 115.

<sup>53</sup> Foner, *Reconstruction*, 530–31.

<sup>54</sup> Chief Justice Taney predicted that the latter right, as practiced by Southern blacks, would be a result of respecting their rights to citizenship. *Dred Scott v. Sandford*, 60 U. S. 393, 450. Radical Reconstructionists agreed when they ratified the Fourteenth Amendment. For a discussion on different nineteenth-century Republican views on the matter see Saul Cornell and Justin Florence, "The Right to Bear Arms in the Era of the Fourteenth Amendment: Gun Rights or Gun Regulation?" *Santa Clara Law Review* 50, No. 4: 1043–1071.

<sup>55</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

expediency and terror of emergency mobilization sufficed in dividing the South into military districts, or forcibly removing Indians toward the west, but the sustained order of courts, police, and jails, required political legitimacy. The conquered, or at least a significant portion of them, had to feel enfranchised.<sup>56</sup> The construction of a stable national infrastructure of enforcement thus required legitimation from a credible public ideology.

The failures to conquer lawlessness in the decades after the Civil War implicated liberal nationalism, the political ethos characterizing Republican rule. Gilded Age liberals dedicated themselves to free labor, individual rights to contract, and government restraint in the economy. Liberalism promised law and order, liberty and justice, an end to lawlessness. But liberal deference to federalism and industrial private property limited both its efficacy and its appeal. In respect to constitutional federalism, Northern liberals felt uneasy about Southern sectionalism and racist extremism but were ambivalent about the exercise of federal power and unwilling to restrain private violence against blacks. National liberalism repelled both white Southerners who resented free labor and feared a return of Reconstruction as well as African-Americans who found themselves betrayed by the withdrawal of troops and judicial restraint in regard to civil rights protections.<sup>57</sup>

On the economic front, liberalism tended to favor a politics friendly to business and contractual conceptions of freedom. Just as the classical liberal federal government stopped short of protecting African-Americans, it also refrained from shielding organized labor from private violence. On the other hand, where liberalism did see a role for a state, the protection of property and lawful order, it contributed to the case its detractors made that it stood merely to serve capital.<sup>58</sup> Classical liberalism gave promises of equality of the law but the Constitution rendered impotent its capacity to secure it, empowering it only to tilt the scales of justice in favor of corporate consolidation. Beyond its jurisdictional reluctance to protect workers and African Americans through criminal justice, liberalism offered few social reform ideas. The rise of a national liberalism thus had predictably limited appeal in the South and among labor.

Inequities in the age of rapid industrialization exacerbated the crisis of political legitimacy. Federal retrenchment in law enforcement continued under Hayes, thanks not only to Southern resistance but also to organized labor. In his first year of office, President Hayes faced an unprecedented national labor strike, supported by a hundred thousand workers, ranging from Baltimore to Pittsburgh. The Great Railroad Strike brought transit and shipping to a halt before federal troops and local militia crushed the strikers. With a thousand arrested and a hundred killed in 1877, the growing industrial labor movement came to distrust state and federal authority as the enforcement arm of capital, a posture that would define labor politics for the rest of the Gilded Age. In 1878 the Posse Comitatus Act limited military involvement in domestic law enforcement, and was championed by both the resurgent white South and those concerned with

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<sup>56</sup> See Franz Oppenheimer, *The State: Its History and Development Viewed Sociologically* (New York: Vanguard Press, 1914); Arthur A. Ekirch, *The Civilian and the Military* (New York: Oxford University Press, 1956).

<sup>57</sup> For more on Republican liberal ideology and its connection to postwar economic policy, see Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven and London: Yale University Press, 2007).

<sup>58</sup> On the centrality of contractual conceptions of liberty to period thought, see Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998). For a critical take on nineteenth century political rule and racial exclusion see Barbara Young Welke, *Law and the Borders of Belonging in the Long-Nineteenth-Century United States* (Cambridge: Cambridge University Press, 2010).

the recent military crackdown on labor. The Democrats in Congress overrode Hayes's veto, marking the end of the Republican military regime begun during the Civil War, persisting under the Radical Republicans despite the stubbornness of President Andrew Johnson, and carried out by President Ulysses S. Grant in Reconstruction.<sup>59</sup>

Having retreated from the South, the U.S. military continued to aspire to impose a stable and orderly rule in the west. Along with the South, the West had considerably higher rates of crime than in the Northeast, although this legacy has been exaggerated.<sup>60</sup> At any rate, the "Wild West" was, in popular conception at least, the paragon of lawlessness.<sup>61</sup> Tropes about civilizing cowboys and savage Indians, lawmen and rugged settlers, legitimated final conquest of the Plains. In the Northeast and Midwest newspaper headlines, even in the same paper, warned about both "lawless cowboys" and "lawless Indians."<sup>62</sup> Despite their struggles in the South, the mostly Republican aspirations to continental mastery, from the Civil War onward, looked rather less impotent to American Indians. Running through U.S. Indian policy, from its use of violent repression to its employment of "civilizing" boarding schools, operated on the logic that Indian culture was savage and lawless, the only question being whether lawlessness was a fixed feature to be eliminated along with the Indians or a character flaw that could be suppressed through personal education.

Meanwhile, the retrenchment of federal enforcement authority continued to leave African-Americans unprotected. In 1880, the Supreme Court upheld an all-white jury conviction of blacks in Virginia even as it guaranteed the rights of blacks on juries in another Virginia case the same year.<sup>63</sup> In the 1883 Civil Rights Cases the Supreme Court struck down the Civil Rights Act of 1875, which had radically expanded federal jurisdiction into the realm of private discrimination.<sup>64</sup> Thanks to the restoration of white home rule, the South used criminal justice policy to serve a modernizing system of racial separation. In the 1880s and 1890s, violent crime in the South, among both whites and blacks, was severe, among the highest rates in the world. White Southerners saw the violence in highly racialized terms, as newspapers in every town published almost daily stories about black criminality.<sup>65</sup> The formal legal system notoriously practiced a dual standard of justice depending on the color of the defendants and victims. Blacks paid heavier fines and suffered longer prison terms. Whites, on the other hand, enjoyed "virtual immunity" when "accused of crimes against black men and women."<sup>66</sup>

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<sup>59</sup> Jensen argues in *Army Surveillance in America* that the Posse Comitatus act was not a Reconstruction era law, but rather a law that signaled the new political era and was motivated in the North by interests about "labor and management" (29–32).

<sup>60</sup> Mitchel P. Roth, *Crime and Punishment: A History of the Criminal Justice System* (Belmont, CA: Thomas Wadsworth, 2005), 172.

<sup>61</sup> This perception continues to inspire scholarly controversy. Contrast Randolph Roth, *American Homicide* (Harvard University Press: The Belknap Press, 2009) and Mathieu Couttenier, Pauline Grosjean, Marc Sangnier, "The Wild West *IS* Wild: The Homicide Resource Curse," *Journal of the European Economic Association*, Volume 15, Issue 3, 1 July 2017, 558–585; with Terry L. Anderson and Peter J. Hill, *The Not So Wild, Wild West: Property Rights on the Frontier* (Stanford Economics & Finance, 2004).

<sup>62</sup> "He Talks About The 'Rustlers.': A Western Man Says That They Are Nothing but Cattle-Thieves," *Chicago Daily Tribune*, 18 April 1892; "Lawless Indians," *Chicago Daily Tribune*, 25 December 1887.

<sup>63</sup> Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Vintage, 1998), 255.

<sup>64</sup> *Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>65</sup> Edward L. Ayers, *The Promise of the New South: Life after Reconstruction* (Oxford: Oxford University Press, 2007), 155.

<sup>66</sup> Litwack, *Trouble in Mind*, 253.

A muffled irritant to Southern white supremacy and an active threat to Indians, Gilded Age national law enforcers proved especially menacing to organized labor. The military was the principal enforcement arm in imposing order on Indians, most famously in such high-profile bloodbaths as Little Bighorn in 1876 and the Wounded Knee Massacre of 1890. Despite Posse Comitatus restrictions, the military also participated in suppressing labor, sometimes joined by private Pinkertons. Pinkerton enforcement against participants in the 1892 Homestead Strike prompted legislation to bar their involvement in law enforcement. In 1894, Democratic President Grover Cleveland, arguably the first and last classical liberal Democratic President after the Civil War, used federal troops to break the Pullman Strike, rationalizing the move as necessary to protect American mail. The Pullman Strike pit labor against interstate capital but also exposed the zero-sum nature of enforcement under American federalism. Whereas the Cleveland administration endeavored to shut down the strikers, Chicago's officials often had more localized sympathies. Reverend William Carwandine reported that the local police did not reenact its anti-labor violence seen in the Haymarket riot, and sometimes even furnished money and goods to the workers. Democratic mayor John P. Hopkins, a former Pullman company dockworker, also sympathized with the workers.<sup>67</sup> Cleveland's actions also alienated labor activist Eugene Debs, who had favored Cleveland's classical liberalism over Republican Benjamin Harrison in 1892, and appreciated Cleveland for criticizing Harrison's violent crackdown of the Homestead Strike.<sup>68</sup> Unfortunately for Debs, the first attempt at federal regulation against monopoly, the Sherman Antitrust Act, soon became weaponized against labor. Debs found himself criminally prosecuted under the act.<sup>69</sup> In prison he radicalized himself toward socialism. *In Re Debs* was only the most infamous example of the federal judiciary's consistent use of labor injunctions to compel workers to end their strikes. As the twentieth century approached the working class distrusted federal law enforcement and Gilded Age liberalism, dismissing them as reliable allies of capital.<sup>70</sup>

### Prophets of Control

Debs's adoption of socialism was not the only significant ideological shift provoked by the Pullman Strike. Chicago social worker Jane Addams found both the anarchic strikers and their greedy capitalist adversaries to represent the two camps responsible for tearing society apart. Historians often depict her reaction as a formative moment for progressivism, whose reformers responded to urban corruption, capitalist inequities, and liberal failures with their own solutions

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<sup>67</sup> William H. Carwandine, *The Pullman Strike* (Chicago: Charles H. Kerr & Company, 1973 [1894]), introduction by Virgil J. Vogel, xxi.

<sup>68</sup> Nick Salvatore, *Eugene v. Debs: Citizen and Socialist* (Urbana: University of Illinois Press, 1982), 114.

<sup>69</sup> Salvatore, *Eugene V. Debs*, 131.

<sup>70</sup> For labor's discontent with American legal system, see William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA, and London: Harvard University Press, 1991). On a related issue, denial of collective bargaining, as an expression of criminal conspiracy, haunted organized labor into the 1920s. See Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge: Cambridge University Press, 1985), 60–95. Nancy Cohen argues that Gilded Age liberalism as a cultural and intellectual movement established the political relationship between corporate capital and individualism a generation before business leaders did so out of personal interest. Cohen, *The Reconstruction of American Liberalism, 1865–1914* (University of North Carolina Press, 2002).

to lawlessness.<sup>71</sup> Unlike classical liberals they stressed government action at all conceivable levels and rejected individualism and axiomatic standards of private property in favor of social reform and social welfare guided by social science. Mostly northern and western, mostly urbanized and middle class, they lacked the distrust of the national state common in the New South or radical labor organizing, whose anarchic expressions of class they regarded a lamentable mirror image of conspicuous industrial greed. But with labor and the rural South, Progressives distrusted unbridled liberal capitalism and shared the hostility to the Northern robber barons that had ridden the Gilded Age to achieve unprecedented wealth.<sup>72</sup> Progressives furnished both a theoretical currency that sought to legitimate new modalities of crime fighting up and down society, and an institutional agenda that aspired to equip government across every level and relevant agency against lawlessness. Their support for regulation and reform sometimes translated into criminalization, in areas ranging from sexual practice to nature conservation.<sup>73</sup>

If the late-nineteenth-century struggle for the law often defined itself in terms of its opposite, lawlessness, the progressives aspired to even more ambitious Manichean clashes—they championed morality against immorality, virtue against sin, fairness against inequity, purity against contamination. But there were sharp limits to what the Progressives could accomplish. Their message spoke to the growing white middle class but had limited appeal beyond that. Enduring constitutional traditions constrained their federal activism, and they achieved their greatest reforms when they operated within and not against the federalist structure.<sup>74</sup> Although they developed elaborate criminological theories, their ideas failed to tether the institutions of local governance and civil society back to the federal state.

Progressives sought to rid American institutions of corruption and unjust profit, and this was especially true of the prison system. Questions of humane treatment had gained national currency since the 1870 National Congress on Penitentiary and Reformatory. Reformers sought to break the longstanding practice of for-profit and contractual labor that had defined northern prisons since the late antebellum era. Among the Progressives were some genuine skeptics of prisons themselves, ranging from police reformers to those in the social worker movement. But even

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<sup>71</sup> For Jane Addams “and the Victorians,” Michael McGerr writes, “these ‘two nations’” were the working class and the upper class.” They were “threatening because of their economic power, their alien cultures, and their mutual hostility.” McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870–1920* (Free Press, 2003), 54.

<sup>72</sup> For the cultural impact of fearful memories of labor uprising and urban disorder see Carl Smith, *Urban Disorder and the Shape of Belief: The Great Chicago Fire, the Haymarket Bomb, and the Model Town of Pullman* (Chicago and London: University of Chicago Press, 1994). On Progressive anxieties about managing modernity see T.J. Jackson Lears, *No Place of Grace: Antimodernism and the Transformation of American Culture, 1880–1920* (Chicago and London: University of Chicago Press, 1994 [1981]). For a general treatment on Progressives and social order, see Charles R. McCann, Jr. *Order and Control in American Socio-Economic Thought: Social Scientists and Progressive-Era Reform* (London: Routledge, 2012). Cohen emphasizes continuity in the story of Gilded Age intellectuals’ role constructing the new progressive liberalism, although she does not discuss questions of criminal reform much. See Cohen, *The Reconstruction of American Liberalism*, 226–233.

<sup>73</sup> For an account of how enforcement methods had to develop to give teeth to increasingly criminal and formal anti-poaching policies see Karl Jacoby, *Crimes Against Nature: Squatters, Poachers, Thieves, and the Hidden History of American Conservation* (Berkeley, Los Angeles, and London: University of California Press, 2003).

<sup>74</sup> See Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Harvard University Press, 1992).

they tended to see the modern law enforcement state as a target of reform rather than one of intractable class or regional antagonism. Although reformers like Thomas Osborne pursued substantive changes, Progressive champions of the “new penology” often aspired for a model of punishment in tension with the numerous severe dimensions of conflict in the surrounding society. Progressives somewhat successfully pushed for standards of humane treatment through rules of indeterminate sentencing and the institutions of parole, probation, and juvenile detention.<sup>75</sup> But in doing so they imagined a society-wide harmony of interests—much as the classical liberals had—when in fact many basic American institutions lacked the minimal consensus to sustain their ideals of reform.<sup>76</sup>

New York at the turn of the century captured the central puzzles of progressive criminal justice reform. The vision for police reform stressed both modernization and propriety, but modernization of city policing was a particularly conspicuous source of corruption, as muckraker Jacob Riis famously exposed. In 1895 the Lexow Committee in New York uncovered systematic police corruption.<sup>77</sup> In response, the city’s new president of the board of police commissioners, Theodore Roosevelt, undertook significant reforms, eliminating partisan hiring, improving training, and rooting out corruption. The state also captured the failure of institutional cohesion, as New York City often found itself in tension with state politics. While the state’s Society for the Prevention of Crime had its offices in New York City, and corresponded with such reformers as Frank Moss,<sup>78</sup> the ambitious social vision of “crime prevention” lacked national sponsorship.

Across the country, California had its own tradition of reform. The most famous police reformer in America was August Vollmer, the police chief of Berkeley, California, from 1905 to 1933. Progressive criminology, as with Progressivism in general, focused on societal and individual reform, professionalization, and social science, and Vollmer incorporated the intellectual theory with a practitioner’s reform agenda. Vollmer embodied the progressive vision. He created the first bureau of academic criminology at U.C. Berkeley, popularized fingerprinting and the modus operandi system, and put patrol officers on bicycles. He believed that America’s law enforcement suffered from scandalously inadequate personnel and aspired for a future in which all officers had at least a four-year degree. He kept abreast of criminological developments—of methods of criminal detection and apprehension, of theories of punishment and rehabilitation, of developments in legal practice—all over the country and world, and his acolytes took his model of professionalization to cities nationwide.<sup>79</sup>

Vollmer and many of his ilk did not embrace the day’s fashionable racism, but in general the Progressives’ priorities made them especially vulnerable to supporting eugenics and tolerating segregation. As self-conscious urbanites on the cutting edge of scientific inquiry, they believed a rational state could best manage the industrializing population, and nothing offered a more

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<sup>75</sup> Thomas G. Blomberg and Karol Lucken, *American Penology: A History of Control* (New Brunswick, Transaction, 2010) 74–75.

<sup>76</sup> Rebecca M. McLennan writes that “The just society was one in which social relations of all kinds were cooperative rather than antagonistic in nature,” but this “only existed in reformers’ ethical imagination.” *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State, 1776–1941* (Cambridge University Press, 2008), 378.

<sup>77</sup> Roth, *Crime and Punishment*, 173–74; Report and Proceedings of the Senate Committee Appointed to Investigate the Police Department of the City of New York, 1905.

<sup>78</sup> Jacob August Riis to Frank Moss, 13 April 1901, RSPC Box 1.

<sup>79</sup> Gene E. Carte and Elaine H. Carte, *Police Reform in the United States: The Era of August Vollmer, 1905–1932* (Berkeley: University of California Press, 1975).

systematized theory of the human condition than eugenics, a perniciously contagious theory of Progressive Era criminology. Inspired by the determinism of such thinkers as Lombroso, many of the era's loudest champions of scientific criminology focused on demographics.<sup>80</sup> Sterilization laws took root in many states, particularly in the West, including California, Delaware, Idaho, Maine, Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Oregon, Utah, Virginia and Wisconsin.<sup>81</sup> The popularization of crime statistics brought together North and South in a post-Reconstruction reunion over subjugation and white supremacy. Eugenic theories dovetailed with a nativism toward immigrants that some but not all Progressive indulged in—a racial conception of the American state that crossed over into some of the protectionist labor movement as well as the increasingly ecumenically racist deep South.<sup>82</sup> Immigration control was one of the most significant areas of Gilded Age and Progressive Era federal law expansion, from the Chinese Exclusion Act of 1882 and other laws targeting Asian migrants to the aftermath of World War I.<sup>83</sup>

On questions of racial violence, the middle-class whites who dominated Progressivism were mostly ambivalent. They lacked a satisfactory answer to the lawlessness of Southern terror. Ida B. Wells, the most famous anti-lynching muckraker, called for an aroused public response “sufficient to stop the crusade of lawlessness and lynching,” but there was little inertia for a federal solution to this regional plague.<sup>84</sup> Although an extrajudicial form of discipline, lynching perversely claimed the mantle of justice. Of the nearly 3,000 lynchings that drenched the Progressive Era with blood from 1889 to 1918, the large majority were done in the name of enforcing criminal laws against rape, physical assault, murder, or arson.<sup>85</sup> Meanwhile, Southern prisons became known for “mass sickness, brutal whippings, discarded bodies, near starvation, rape,” and Southern cities formalized racial separation.<sup>86</sup> Jim Crow laws multiplied after the 1896 Supreme Court decision *Plessy v. Ferguson* overruled classical liberal property rights to give the South a green light to pursue segregation statutes, actively enforced by Courts and police.<sup>87</sup> Some historians have contrasted the “legal realism” in progressive constitutional theory with the anachronistic decision in *Plessy*—a contrast that speaks some truth—but this dichotomy

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<sup>80</sup> Lombroso's eugenics combined hereditary and environmental factors. See Marvin E. Wolfgang, “Pioneers in Criminology: Cesare Lombroso (1835—1909),” *Journal of Criminal Law, Criminology, and Police Science* 52, No. 4 (November–December 1961), 361–391.

<sup>81</sup> Thomas G. Blomberg and Karol Lucken, *American Penology: A History of Control* (New Brunswick, Transaction, 2010), 68–69. For social science and racialist policing in the Progressive urban north see Khalil Gibran Muhammad, *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America* (Cambridge, MA, and London: Harvard University Press, 2011) and chapter 5 of Kali N. Gross, *Colored Amazons: Crime, Violence, and Black Women in the City of Brotherly Love, 1880–1910*, (Durham and London: Duke University Press, 2006).

<sup>82</sup> Gwendolyn Mink, *Old Labor and New Immigrants in American Political Development: Union, Party and State, 1875–1920* (Ithaca and London: Cornell University Press, 1990).

<sup>83</sup> See Charles R. McCann, Jr. *Order and Control in American Socio-Economic Thought: Social Scientists and Progressive-Era Reform* (London: Routledge, 2012), 22. On immigration control and the construction of white identity see Kunal Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600–2000* (New York: Cambridge University Press, 2015).

<sup>84</sup> Ida B. Wells, *Southern Horrors: Lynch Law in All Its Phases* (New York, 1892).

<sup>85</sup> Litwack, *Trouble in Mind*, 306.

<sup>86</sup> Edward L. Ayers, *The Promise of the New South: Life after Reconstruction* (Oxford and New York: Oxford University Press, 1992), 154.

<sup>87</sup> Leon F. Litwack, *Trouble in Mind*, 256. For convict leasing in the South see David M. Oshinsky, *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice* (New York, Free Press, 1997).



overlooks both the classical liberal critiques of the *Plessy* Court and the harmonization between progressive ideology and segregation.<sup>88</sup> Particularly compared to the lawlessness of lynching, Southern progressives defended segregation as a modernizing project, the scientific application of urban regulatory power to the environmental differences between races.<sup>89</sup>

Outside the problem of racial violence, the Progressives had few compunctions about expanding federal authority, either in social legislation or criminal justice, but produced mixed results. The Pure Food and Drug Act 1906 and Harrison Narcotics Act of 1914 brought the federal government into the business of regulating drug production and consumption, marking both the advance of Progressive political economy and Progressive criminological logic, as well as the nationalization of an issue that had been more locally managed, such as in the California opium laws of the late-nineteenth century. In 1908 President Theodore Roosevelt, encouraged by his own experiences with police reform, concerned with radical threats to the liberal order, and aiming to delegate basic national law enforcement power, created the Bureau of Investigation through executive order. In 1910 Congress passed and President William Howard Taft signed the Mann Act, targeting “white slavery,” rationalizing an expansion of the national government’s authority over migration in terms of the new threats posed by the ease of interstate movement.<sup>90</sup> But while the Mann Act expanded federal power, it did so in uncertain ways. The Dillingham Commission affirmed the authority of both FBI and immigration officials, while stressing an economic analysis. The multifaceted approach to pursuing white slavery produced a confusion of jurisdictional authority, prompting the *Atlantic Constitution* to editorially criticize the “the Chaotic Mann Law.”<sup>91</sup>

Insofar as the Progressive vision relied on a legitimate national power, it suffered two major structural problems. First, if Progressives and organized labor split on state power, they continued to share a distrust in the federal judiciary, which appeared to embrace nineteenth-century liberalism more assertively than ever. Starting in 1905, the Supreme Court was overturning state-level business regulations in the name of contractual liberty. Having mostly abandoned African-Americans to the whims of local and state law enforcement, conservatives in the judiciary instead focused on the threat that labor laws posed to the “substantive due process” rights of economic actors. Progressive jurists panned the development as activist adjudication based on antiquated liberal ideology. Just as it had restrained 1870s and 1880s civil rights enforcement, liberalism threatened to restrain the progressive social agenda at both the federal and state levels, and in the longer run it also posed a threat to aspects of their law enforcement agenda.<sup>92</sup>

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<sup>88</sup> See Maureen A. Flanagan, *America Reformed: Progressives and Progressivism, 1890s–1920s* (New York: Oxford University Press, 2007), 120–21.

<sup>89</sup> Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America* (New York: Free Press, 2003), 193–195.

<sup>90</sup> Jessica R. Pliley describes the Mann Act as “the product of the Progressive Era’s faith that thorough investigation could lead to solutions for any social ill.” Pliley, *Policing Sexuality: The Mann Act and the Making of the FBI* (Cambridge, MA: Harvard University Press, 2014), 3.

<sup>91</sup> Pliley, *Policing Sexuality*, 51, 110.

<sup>92</sup> *Lochner v. New York* 198 U.S. 45 (1905). For more on *Lochner*’s relationship to legal thought see “The War on Crime Constitution,” chapter 6 of this dissertation.

Second, the national state that Progressivism was building threatened to divide their ranks. Its most effective expansions came alongside America's growing role as an imperial power.<sup>93</sup> As Randolph Bourne admonished, "war is the health of the state," and this was certainly true when it came to policing. Experiments in enforcing American rule in the Philippines War later guided police and surveillance techniques at home.<sup>94</sup> The war dovetailed with the modernizing racialized character of American statecraft and contributed to the construction of racialized conceptions of American citizenship.<sup>95</sup> Both the policing infrastructure and explicit ethnic identitarianism sat uneasily with at least some formulations of liberalism running through the progressives' reformism. At the same time, the fear of hemispheric lawlessness motivated President Theodore Roosevelt's foreign interventions in Latin America, particularly in response to the Venezuela crisis. The Roosevelt Corollary to the Monroe Doctrine sought to keep "neighboring countries stable, orderly, and prosperous" and target "flagrant cases of. . . wrongdoing" through its "international police power."<sup>96</sup> Roosevelt also lashed out against foreign threats to American security in rationalizing the need for heightened national law enforcement. If questions of empire divided Progressives, the controversy would intensify as the war was brought back home.

Historians often regard World War I as both the culmination and unravelling of progressivism.<sup>97</sup> One explanation is that the war brought enforcement authority to the breaking point of its contradictions. World War I's wave of repression was a chaotic and unsustainable affair, a collaboration of the authoritarian warfare state with vigilante mobs. It could not function this way at peacetime. In the long-term the war helped produced welfare liberalism, but no stable security state, much less a liberal one, materialized.

From the beginning, the war divided national leaders—President Woodrow Wilson's Secretary of State William Jennings Bryan was stridently opposed to war, former President Theodore Roosevelt was stridently in favor, and Wilson won reelection promising non-intervention only to deploy American forces the next year. The war unleashed national power like nothing since the Civil War. It vastly expanded the regulatory state, bringing together Progressives behind the first Southern Democratic presidency since before the Civil War. Wilson maintained commitments to the white South in his racial politics, including the segregation of the Armed Forces. The Bureau of Investigation adopted new surveillance powers. The federal

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<sup>93</sup> International agreements had already extended American law enforcement power in the form of extradition. See Katherine Unterman, *Uncle Sam's Policemen: The Pursuit of Fugitives across Borders* (Cambridge, MA: Harvard University Press, 2015).

<sup>94</sup> Alfred McCoy, *Policing America's Empire: The United States, the Philippines, and the Rise of the Surveillance State* (University of Wisconsin Press, 2009).

<sup>95</sup> Paul Kramer, *The Blood of Government: Race, Empire, the United States, & the Philippines* (Chapel Hill: University of North Carolina Press, 2006); Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2014).

<sup>96</sup> The Roosevelt Corollary to the Monroe Doctrine is described in Theodore Roosevelt's Fourth Annual Message, 6 December 1904, APPUCSB.

<sup>97</sup> Michael McGerr calls the war "the extraordinary culmination of the progressive movement" and "the best opportunity they ever had to remake the nation along progressive lines." Within the same paragraph he concludes that "the Wilsonian war effort became the death knell for the progressive movement." McGerr, *A Fierce Discontent*, 280–81.

criminal code expanded to prosecute peaceful dissidents and draft dodgers. The regime was thus hotly contested by the radical left and labor, who bore the brunt of wartime repression.<sup>98</sup>

In the aftermath of war, Progressive governance broke down under the weight of its own fulfillment. Federal law enforcement expanded at times unceremoniously. Technological modernity helped justify new criminal law expansion, as the Dyer Act of 1919 aimed to assist states in pursuing automobile thieves crossing state lines. But in general, the conspicuous plays for national power were more controversial. Wartime experiments with alcohol prohibition in Washington, DC, helped inspire the Eighteenth Amendment, an unprecedented expansion of national law enforcement power.<sup>99</sup> The Treasury, barred from federal law enforcement following a fraud scandal, was now invited back to undertake the most ambitious criminal justice program. The Justice Department's involvement in the Red Scare and Palmer Raids also grew directly from the Wilsonian security state, but became so controversial as to throw the future of the Bureau of Investigation into uncertainty.<sup>100</sup>

The curse of general disillusionment after World War I, the scandalous repression of labor and dissidents, and the popularly flouted national project of prohibition, all threatened to undermine the social consensus required of national law enforcement authority. But in helping to undercut the Wilsonian Democratic Party, these highly debated national scandals took on a different meaning in the Republican presidencies that characterized the 1920s. Presidents Warren G. Harding, Calvin Coolidge, and Herbert Hoover had inherited an infrastructure produced by Democratic and Republican progressives. Moderates decried the excesses of Attorney General Mitchel Palmer and the Bureau of Investigation. The 1919 May Day panic, followed a year later by anticlimax, hemmed in the Bureau's power and fueled the rise of J. Edgar Hoover, a moderate defender of due process and restraint compared to Palmer.

Progressive middle-class respectability had fueled labor crackdowns and orchestrated national prohibition, but now the conservative Harding administration oversaw the Justice Department's repressors and Treasury Department's Alcohol Bureau enforcers, whose legitimacy was highly contested by much of the country. Middle-class nativism and fear of extremism alienated labor during the controversial criminal trial of Nicola Sacco and Bartolomeo Vanzetti in 1921.<sup>101</sup> A Progressive nativism cultivated at least passively by reformers, suffragettes, and American presidents became increasingly fixated on Eastern and Southern Europeans, culminating in the 1924 Immigration Act that sharply curtailed migration. The Progressives had saved and expanded the security state, giving it new rationales and new avenues of enforcement, only to discredit themselves with their overreach and thus pass it off to the conservative Republicans, who themselves maintained it for another decade amidst a vastly different breakdown of partisan loyalties.<sup>102</sup>

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<sup>98</sup> Harry N. Scheiber, *The Wilson Administration and Civil Liberties, 1917–1921* (Ithaca: Cornell University Press, 1960).

<sup>99</sup> For more on war and Prohibition see McGirr, *War on Alcohol*, 31–37.

<sup>100</sup> On wartime repression see David Kennedy, *Over Here: The First World War and American Society* (Oxford University Press, 1982). On progressivism through the war see Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge, MA: Harvard University Press, 1998).

<sup>101</sup> The controversy was, indeed, international. See Lisa McGirr, "The Passion of Sacco and Vanzetti: A Global History" in *Journal of American History* 93, No. 4 (2007).

<sup>102</sup> Michael McGerr argues that the progressives' social reform idealism, pit against a lingering liberal individualism, contributed to the conservative backlash after World War. McGerr, *A Fierce Discontent*. Michael Willrich locates the "first war on crime" in Prohibition-era Chicago, the "tide of American progressivism" having fallen after World

## Anarchy or Despotism

In the aftermath of World War I, the federal government undertook its most ambitious and disastrous peacetime experiment of law enforcement. Alcohol prohibition aspired to secure every household against lawlessness. If World War I yielded the unsustainable repression of wartime anarchy and despotism, Prohibition brought America's law enforcement contradictions to their peacetime climax. Progressives found themselves somewhat divided. Indeed, the political organizing that resulted in the Eighteenth Amendment was a precarious phenomenon, one that happened to coalesce and succeed at just the right moment. As John Allen Krout wrote in 1925, Prohibition was "the final expression of a fundamental change which had been more than a century in the making."<sup>103</sup> The temperance movement had a grip on urban northern politics since the antebellum period, and it returned with greater force in the early-twentieth century. Whereas the antebellum Whigs had largely focused their efforts on social pressure, the new Prohibitionists believed in the force of law. On this matter, some of the South were early adopters, having experimented with liquor bans during the Civil War. By 1917, of the 26 dry states, only four were northern—the rest were west of the Mississippi or South of the Mason Dixie.<sup>104</sup> The affinities to this most ambitious social reform agenda complicated the regional dynamics of progressive activism and contributed to the opening for a transformation in liberal politics. More generally, while Prohibition exacerbated the controversy over national authority, its ideological and institutional realignments invited completely novel modalities of political solidarity.

The Prohibition coalition brought together women outraged about the prevalence of drunken men beating their wives, western Progressives, neo-Whig proponents of WASP respectability, and culturally conservative Southerners. By the late-nineteenth century, women often dominated the activism. Progressive women opposed saloons in hopes to reduce the epidemic of drunken male violence within the home. These "Home Defenders" saw this public health cause as part of their broader project "to regulate pleasure and alter masculine behavior."<sup>105</sup> The Women's Christian Temperance Union organized throughout the Gilded Age in the Prohibition Party, whose percentage of the national vote peaked at 1.91% in 1904.<sup>106</sup> After that, the anti-Saloon League became the nexus of the national prohibition push, helping to make the movement increasingly middle class, with leaders of the national Anti-Saloon League disproportionately hailing from the northeast.<sup>107</sup> Women dominated the league. The political volatility was clear. Progressive splits on Prohibition were quickly exposed. Some lifelong adherents to the Prohibition Party eschewed the amendment, as they did not want it to reinforce the mainstream stranglehold by the Republican and Democratic Parties.<sup>108</sup> Andrew Volstead, the Republican Congressman after whom the federal legislation was named, went on to cosponsor one of the

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War I. See Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge and New York: Cambridge University Press, 2003), 281.

<sup>103</sup> John Allen Krout, *The Origins of Prohibition* (New York, Alfred A Knopf, 1925), 297.

<sup>104</sup> Jimmie Lewis Franklin, *Born Sober: Prohibition in Oklahoma, 1907–1959* (Norman: University of Oklahoma Press, 1971).

<sup>105</sup> McGerr, *A Fierce Discontent*, 83.

<sup>106</sup> Lisa M. F. Andersen, *The Politics of Prohibition: American Governance and the Prohibition Party, 1869–1933* (Cambridge: Cambridge University Press, 2013), 63, 283.

<sup>107</sup> Jack S. Blocker, Jr., *Retreat from Reform: The Prohibition Movement in the United States, 1890–1913* (Westport: Greenwood, 1976), 10–15.

<sup>108</sup> Andersen, *The Politics of Prohibition*, 227.

most prominent pieces of progressive legislation in the early 1920s, an act to protect farmers' cooperatives from antitrust regulation.

The scourge of alcohol prohibition spanned from the Armistice through the first year of the New Deal. The effort to ratify the Eighteenth Amendment was completed before the end of the war. When Congress passed the Volstead Act, President Wilson vetoed the bill, considering it an improper and futile attempt to regulate private behavior. Brewers throughout the country rejoiced, but soon found themselves disappointed when a significant bipartisan coalition in Congress overran his veto.<sup>109</sup> Elihu Root argued that the law was unconstitutional, an improper exercise of authority now that the war had ended.<sup>110</sup> The Supreme Court upheld the law over a scathing dissent penned by Justice Clark Reynolds, who condemned the spectacle of making enduring policy based on wartime emergency. Quoting *Ex parte Milligan* at length, Reynolds warned that making an enduring policy for peacetime in the midst of the exigencies of war was a "doctrine [that] leads directly to anarchy or despotism."<sup>111</sup> This chaos of authoritarian hubris escalated year by year, culminating in the frantic war on crime and crisis of legitimacy that welcomed FDR in 1933.

As a national experiment, Prohibition promised a bright new era of policy modernization, a harmonization of progressive social values, familial tranquility, national power, and state and local authority. Prohibitionists predicted a new, preventive approach to crime and social dysfunction, where scientific governance would cut off domestic violence at the source. They promised enforcement beyond the vagaries of bureaucratic stagnation, as Prohibition agents would be chosen for their expertise and devotion to temperance, rather than through the Civil Service. Above all Prohibition promised to solve the crisis of law and order tracing back to the nineteenth century.

In practice, Prohibition produced lawlessness all the way down. Enforcing Volstead would require a concerted governmental effort and an agreeable population. The "wets" in the Democratic Party never believed in the justice of the law and the Republicans vowing a return to normalcy after World War I were not dedicated to the full jurisdictional implications of the project's ambitions. President Warren G. Harding himself had bi-weekly poker nights at which whisky was served. Prohibition's enforcement exacerbated and exposed the institutional uncertainty of law enforcement, systematic corruption, and American violence. It vastly expanded opportunities for organized crime, whose flouting of a contested law often brought them public respect rather than universal opprobrium.<sup>112</sup>

From the beginning, Prohibition only exposed the failure of the modern state to curb even its own lawlessness. At the federal level, Prohibition heightened the tensions between Treasury and Justice. The crusade against alcohol brought the Treasury back into law enforcement. Its new Prohibition Bureau, freed from the constraints of Civil Service, became the paragon case of federal patronage. Understaffing and low budgets limited the number of Treasury agents

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<sup>109</sup> "House, 176 To 55, Overrides Veto of War Prohibition: President's Message a Great Surprise and Causes Hurry and Excitement on Floor," *New York Times*, 28 October 1919.

<sup>110</sup> "Dry Enforcement Law Enacted by False Pretenses, Elihu Root Says: Action of Congress Was Beyond Its Power, He Asserts in Suit in U. S. Court," *San Francisco Chronicle*, 7 November 1919.

<sup>111</sup> *Jacob Ruppert v. Caffey*, 251 U. S. 264, 307 (1920).

<sup>112</sup> Marc Mappen, *Prohibition Gangsters: The Rise and Fall of a Bad Generation* (New Brunswick: Rutgers University Press, 2013).

available for arrests. The prosecution would be left to the Justice Department, still barred from conducting arrests. Prohibition meanwhile clogged up the courts, accounting for almost two-thirds of all federal district court cases, which heard 85,283 cases in 1928 and 1929.<sup>113</sup>

The tensions between the federal government and the states, meanwhile, took on a peculiar character. The Eighteenth Amendment had vaguely given Congress as well as the states “concurrent power to enforce” Prohibition.<sup>114</sup> A novel dynamic arose between the various levels of government, charged with working together as never before, but without the material means or public faith necessary to achieve the ambitious goal of stamping out liquor. Some state governments, namely Maryland, barely lifted a finger in enforcement. Democratic hotbeds like New York were initially reluctant to expend much energy on the project, leaving the Treasury the impossible task of policing the border with wet Canada as well as the biggest city in the United States. Tammany Hall opposed Volstead outright, but New York soon passed a Mullen-Gage Enforcement Law, a local version of Volstead.<sup>115</sup> The unprecedented task of abolishing alcohol, far from energizing federal and state authorities in eager cooperation or friendly competition over arrests and prosecutions, yielded an upside-down federalism in which the impotent and corrupt authorities at all levels of government disclaimed responsibility for the repeated failures. In the longer run, this would fuel ideological critiques along various lines—progressives and socialists could point to corruption, conservatives could lament the nationalization and argue that the states needed to flex more power.

The contested legitimacy of the law threatened political stability and exposed the tenuousness of the two parties. Prohibition stood as the grand culmination of bourgeois Progressivism. It was also anathema to the Democratic Party, which had fairly consistently championed the right to drink since its antebellum struggles against the Whigs. That Republicans took over at the moment that Prohibition was constitutionally codified exacerbated the divisions between conservative and liberal progressivism, and gave reformist liberals a convenient target of animus for which their ideological forebearers were at least somewhat responsible. Republicans notoriously provided little funding and federal oversight.<sup>116</sup>

The unpopularity of the law posed particular problems for Democrats, traditionally champions of the freedom to drink. In the early 1920s, the Democrats identified problems of institutional legitimacy and lawlessness, but vowed to make Prohibition work. In 1920 both Democrat James Cox and Republican Warren Harding were reluctant to speak openly about their plans for enforcing Prohibition, to the consternation of the Anti-Saloon League.<sup>117</sup> Ultimately Cox signaled a moderate support of the Eighteenth Amendment, declaring the issue resolved, “as dead as the issue of slavery,” pledging to enforce the law as well as he could.<sup>118</sup> He and his running mate, Franklin D. Roosevelt, lost to Warren Harding. In 1924, Democratic candidate John Davis ran against Harding’s and Coolidge’s reputation for cronyism. Railing against corruption and illegitimacy, Davis squared his dedication to law and order with his identification as “a progressive. . . [who] cannot see a wrong persist without an effort to protect it.” He

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<sup>113</sup> David E. Kyvig, *Repealing National Prohibition* (Kent, Ohio & London Kent State University Press, 2000), 108.

<sup>114</sup> Eighteenth Amendment.

<sup>115</sup> Michael A. Lerner, *Dry Manhattan: Prohibition in New York City* (Cambridge, MA, and London: Harvard University Press, 2007), 73, 76.

<sup>116</sup> Lerner, *Dry Manhattan*, 65.

<sup>117</sup> “Ohio ‘Drys’ Demand A National Drive Against Gov. Cox,” *New York Times*, 16 July 1920.

<sup>118</sup> “Prohibition Issue Dead, Cox Repeats,” *New York Times*, 14 September 1920.

lamented an impotent executive branch and a vigilante atmosphere, in which “administration of the law” had become a matter “little different from those of private vengeance.” The answer resided in steadfast “enforcement of the law, and all the law,” whether against “wealth that endeavors to restrain trade and create monopoly” or in affirmation of the Eighteenth Amendment. Any official who failed to enforce Prohibition, inscribed as it was in the Constitution, should be held in contempt. Davis identified corruption and lawlessness as a grave problem of political legitimacy. The “solidarity of the great war” had yielded to “a chaos of blocs and sections and classes and interests, each striving for its own advantage, careless of the welfare of the whole.” In addition to tax cuts, Davis promised to boost national morale by securing America’s international participation.<sup>119</sup>

Such efforts to affirm national unity and the rule of law could not conceal the widespread violence and rampant lawlessness, the corruption from top to bottom. Enforcement was conspicuously uneven, targeting the poor and people of color. Enforcement sometimes fell to vigilantism, another echo of World War I but this time directed not at seditionists and slackers but at everyday Americans looking for a drink.<sup>120</sup> In September 1924, New York Judge Alfred J. Talley condemned America’s high murder rate in an article titled “The Most Lawless Nation in the World.”<sup>121</sup> In 1926 he testified before a Senate Committee, attributing a doubling of homicide rates, rampant corruption and crime, to the impossibility of enforcing Prohibition.<sup>122</sup>

Americans agreed that they could not ignore the problems of Prohibition, but they sharply disagreed on the proper remedy. Some began to rethink their positions. Irving Fisher had opposed Prohibition, but told Congress in 1926 that he had “radically changed” his “attitude,” and said that the answer was “increasing the legal machinery.” Only “fuller enforcement” would bring “real personal liberty.”<sup>123</sup> In 1929, Assistant Attorney General Mabel Willebrandt conceded the lawlessness her favored policy unleashed. She condemned the “wholly unwarranted. . . killing by prohibition agents.” She decried the hypocrites enforcing prohibition, drinking while they punished, saying that enforcement itself had become lawless. But she proposed strengthened enforcement, better coordination between Justice and the Treasury, more controls on industrial alcohol, tightening the border with Canada, and ridding of patronage.<sup>124</sup>

By 1928, the ambivalence of the Democratic Party toward the problem of Prohibition and lawlessness began to break in favor of a coherent critique. The party platform still demonstrated the instability of positions. While elsewhere it stressed states’ rights against federal usurpation, the platform condemned the Republicans for having “flagrantly disregarded” the Constitution and pledged that Democrats would make “an honest effort to enforce the eighteenth amendment and all other provisions of the federal Constitution and all laws enacted pursuant thereto.”<sup>125</sup> But the convention ultimately nominated Al Smith, whose stark opposition to prohibition stirred great controversy. Smith took “bribery, corruption, lawlessness” and “disrespect for[] all law” not as consequences of inadequate enforcement of Prohibition, but as results of Prohibition itself.

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<sup>119</sup> Text of John W. Davis’s Address Accepting Presidential Nomination, *New York Times*, 12 August 1924.

<sup>120</sup> See McGirr, *War on Alcohol*, ch. 4 and 5.

<sup>121</sup> Literary Digest; New York Vol. 82, Iss. 11, (Sep 13, 1924): 32; “The Most Lawless Nation,” *The Washington Post*, 24 April 1929.

<sup>122</sup> “U.S. Most Lawless Nation Through Dry Law, Judge Asserts,” *The Washington Post*, 8 April 1926.

<sup>123</sup> Irving Fisher, *Prohibition at its Worst* (New York: Macmillan, 1926), 229–30, 238.

<sup>124</sup> Mabel Walker Willebrandt, *The Inside of Prohibition* (Indianapolis: Bobbs Merrill, 1929), 123, inter alia.

<sup>125</sup> 1928 Democratic Party Platform, 26 June 1928, APPUCSB.

He cited William Howard Taft and Woodrow Wilson as Progressive era presidents who agreed with this skepticism. Wilson had held that one “cannot regulate the morals and habits of a great cosmopolitan people” through “unreasonable restrictions upon their liberty and freedom.” While he vowed to enforce the law as president, Smith also promised to bring the issue to the people and do what he could to return the issue to the states.<sup>126</sup> Republican Herbert Hoover’s victory over Al Smith made the drys ecstatic. But Hoover inherited a law enforcement machinery with an ambiguous future, contested in increasingly partisan terms. He beat the wets only to preside during the peak of the institutional crises that had germinated for generations, exacerbated in their intensity by the 1929 crash and ensuing Depression.

The state governments, meanwhile, had their own crises of legitimacy. In New York Progressives had not produced a lasting solution to one of their most important centers of reformist experimentation. Franklin Delano Roosevelt, who gave the nominating speech for Al Smith, won the 1928 gubernatorial election, but the Democrats had lost several traditionally reliable states in the South. Politics were volatile. The President-elect, Herbert Hoover, was massively popular, including among Democrats. Roosevelt himself regarded him “an old friend.”<sup>127</sup> Roosevelt struggled, with the long-standing taint of Tammany Hall, to wage his own war on crime and lawlessness. As governor he developed a distinct liberal approach that sought both humanitarian reform and toughness on crime. In New York, Roosevelt had to contend with the specters of corruption and lawlessness. On graft, he found himself caught between Tammany Hall on the one hand and critics to his left and right on the other. Demands on him to investigate state and local corruption often brought him to the limits of his power. The Moreland Act, passed in 1907, allowed for the governor to initiate investigations, but they were limited to state activity. For local affairs, he was largely dependent upon the Special Assistant Attorney General if he wanted investigations with any teeth, but these required specific allegations, as a frustrated Roosevelt asked his adviser Louis Howe to remind a journalist.<sup>128</sup> Eventually when a district attorney in the pocket of Tammany Hall made no indictments in New York City, Roosevelt allowed Republicans—the state’s Attorney General and a Supreme Court Justice—to take over responsibility.<sup>129</sup>

In his first term as governor, Roosevelt cautiously practiced ambivalence amidst tumultuous controversies regarding crime and punishment. In late 1929, prison riots brought the issue of crime control to the forefront of New York politics. Roosevelt discouraged newspaper journalists from speaking directly with prisoners, lest they publish inaccurate “gory details,” but he conceded the need for “better prison accommodations.” His ambivalence expressed itself in his opinion of the draconian Baumes laws, which condemned a prisoner to life upon a fourth conviction. He thought the laws were exercised “harshly and unjustly in some cases, though perfectly rightly and justly in other cases.”<sup>130</sup> He sympathized with the progressive criminological work of Sheldon and Eleanor Gleuck, who worked on juvenile problems.<sup>131</sup>

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<sup>126</sup> “Prohibition Evils: Mr. Al. Smith’s Plan to Stop Corruption,” *Irish Times*, 29 October 1928. For more on the 1928 realignment, see McGirr, *War on Alcohol*, ch. 6.

<sup>127</sup> Roosevelt to Mr. Betts, 21 December 1928, in Elliott Roosevelt, Editor, *F.D.R.: His Personal Letters, 1928–1945* (New York: Duell, Sloan and Pearce, 1950), 20 (hereinafter, *FDR Letters*).

<sup>128</sup> Roosevelt to Howe, 3 October 1929, *FDR Letters*, 75.

<sup>129</sup> Roosevelt to W. Russell Bowie, 9 October 1930, *FDR Letters*, 146.

<sup>130</sup> Roosevelt to Frank E Gannett in Rochester, 4 Jan 1930, *FDR Letters*, 99–100.

<sup>131</sup> Roosevelt to Sam A. Lewisohn, 4 February 1930, *FDR Letters*, 106–107.



Roosevelt continued to bide his time on the politics of prohibition. Roosevelt predicted that before long Prohibition would be a problem for the Republicans.<sup>132</sup> At a time when many congressional campaigns focused more on Prohibition than the Depression, Roosevelt still practiced caution in his own pronouncements.<sup>133</sup> He believed that Al Smith had “every wet vote in the country” but he had failed to win over enough “middle of the road votes.”<sup>134</sup> Louis Howe, looking ahead to Roosevelt’s national political prospects, urged Roosevelt to strike a middle ground through the logic of states’ rights. Roosevelt should pay lip service to temperance and cheer the abolition of the public saloon, while clearly condemning the ineffectual nationalization Prohibition had foisted upon the country, emphasizing the right of states to pick their own alcohol policies.<sup>135</sup> Walter Lippman criticized Roosevelt for striking this compromise in a radio appearance in March 1930, in which he stressed the need for states to take a leading role but refrained from calling for repeal.<sup>136</sup> Such ambiguities continued to haunt the party. The 1930 Democratic state platform called for repeal but New Yorkers were still uncertain about the proper policy course.<sup>137</sup> New Yorkers reelected Roosevelt who ran on a tepid campaign slogan, “Bread, Not Booze.”<sup>138</sup> Upon reelection he continued to focus on reform rather than anti-prohibition activism. Corruption scandals plagued New York City, particularly as it concerned the courts and police department. The Hofstadter Committee probed deeply, finding framings, false imprisonments, and systematic injustices. Over a thousand witnesses were called. In 1931, Governor Roosevelt moved to remove some of the implicated officials. But soon the embarrassment of lawlessness would prove more of an asset than liability to Roosevelt.

Nineteen-thirty-one was a big year for tough talk against crime. At the federal level, President Hoover had deferred to federalism in the year before, calling on the states to act. “Every single State has ample laws that cover such criminality,” the president insisted. “What is needed is the enforcement of those laws, not more laws.” The federal role would only aid states where they could not meet the challenge.<sup>139</sup> But in 1931, Hoover’s response to racketeering finally coalesced around a “war on crime.”<sup>140</sup> That year the federal government also released its most comprehensive study to date on the problems of American law enforcement. Roosevelt took an interest, hoping his close political ally Howe would get to lead the Commission.<sup>141</sup> The job went to Former Attorney General George W. Wickersham, but ultimately the Commission ended up helping Roosevelt. The study marked an unprecedented national interest in crime and punishment, as well as a general awareness that the institutions of law and order had faltered. The National Commission on Law Observance and Enforcement, also known as the Wickersham Commission after its chairman, produced fourteen volumes of reports covering alcohol prohibition, criminal statistics, prosecution, deportations, federal child offenders, the federal courts, criminal procedure, penal institutions, including probation and parole, crime and foreign

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<sup>132</sup> Roosevelt to Ruth Bryan Owen, 28 January 1929, *FDR Letters*, 25.

<sup>133</sup> Kennedy, *Freedom from Fear*, 60.

<sup>134</sup> Roosevelt to James C. Bonbright, 11 March 1930, *FDR Letters*, 109.

<sup>135</sup> Howe to Roosevelt, 23 May 1930, *FDR Letters*, 126.

<sup>136</sup> Roosevelt to James C Bonright, 11 March 1930, *FDR Letters*, 109–111.

<sup>137</sup> Roosevelt to Joseph F. Guffey, 26 June 1930, *FDR Letters*, p. 134.

<sup>138</sup> Lerner, *Dry Manhattan*, 295.

<sup>139</sup> Crime War Everyone’s, NYT, 26 November 1930.

<sup>140</sup> “New War on Crime Revealed,” NYT, 23 August 1931.

<sup>141</sup> Roosevelt to Louis M Howe, 21 May 1929, *FDR Letters*, 61.

born, lawlessness and law enforcement, the cost of crime, crime's causes, and the police.<sup>142</sup> The inquiry was sufficiently comprehensive to touch on such topics as police brutality, although the Commission mostly centered on the results of alcohol prohibition, the structure of prohibition's enforcement apparatus, the obstacles to enforcement, and the high casualties including killed law enforcers and civilians. James Britt, Chief Counsel of the Prohibition Bureau, told Chairman Wickersham that either the U.S. should repeal prohibition or get serious about enforcement, which would require looser Fourth Amendment standards and "an annual appropriation of not less than \$25,000,000 and a police force of not less than 5,000 officers."<sup>143</sup>

The Commission's reformist findings on police corruption revealed the problems of upside-down federalism spawned by Prohibition. Berkeley's August Vollmer produced volume fourteen, a plea for systematic police reform. Consulting research prepared by the Commission, including questionnaires from 575 cities, Vollmer's report sought, as the preface put it, "universal underlying causes" behind the "general failure of the police" to keep up with crime and to be "intelligible to every citizen." Its general findings—that politicization afflicted police chief positions, that departments suffered inadequate personnel, that police officers had too many duties—cohered with Vollmer's thinking from before and the decade following. Pointedly, Vollmer criticized departments in San Francisco, Chicago, Detroit, and elsewhere for politicization and graft.<sup>144</sup>

The open hostility between Vollmer's nationally-minded progressive critique and local police departments perfectly underscored the tensions and impotence of the upside-down federalism of Prohibition-era America. This critique met resistance before publication, particularly among local police authorities. Edward Evine from New York complained that "most of the deficiencies" did not apply to his city's police department.<sup>145</sup> The press widely reported Vollmer's criticisms after publication.<sup>146</sup> Page one of the *New York Times* reported the Commission's criticisms of departments for coddling gangs, suffering from "incompetence," and utilizing "inadequate equipment."<sup>147</sup> The *Los Angeles Times* took seriously Vollmer's observation that the city's police chiefs lasted about a year and a half.<sup>148</sup> It editorialized that an improved, more "efficient" department need not "be unduly expensive," blaming inadequate infrastructure on "the taxpayers for not voting funds."<sup>149</sup> Nationwide, police chiefs protested Vollmer's criticisms. Chicago resented accusations of unintelligent personnel, its mayor suggesting that the "Chicago police force, as I know them, are of average intelligence." San

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<sup>142</sup> "Reports of the Wickersham Commission," *Journal of Criminal Law and Criminology* (1931–1951), Vol. 22, No. 4 (Nov. 1931), 613.

<sup>143</sup> Letter from James T. Britt to Wickersham, in *Enforcement of the Prohibition Laws, Official Records of the National Commission on Law Observance and Enforcement*, 71<sup>st</sup> Congress, 3<sup>rd</sup> Session, Senate Document 307, 6 Volumes, 1:110.

<sup>144</sup> National Commission on Law Observance and Enforcement, *Report on Police*, Washington DC, 26 June 1931, Volume XIV, 1, 45.

<sup>145</sup> Edward Evine, Committee of One Thousand, to Vollmer, 9 October 1931, AVP Box 14: U.S. National Commission on Law Observance and Enforcement.

<sup>146</sup> "Police Forces Denounced in Wickersham Report: Politician–Underworld Alliances Found to Rule Many Cities; Specific Remedies Urged," *Washington Times*, 2 August 1931, 1.

<sup>146</sup> "Book Reviews: Our Crime Problem, Crime and the State Police," *New York Times*, 2 August, 1931.

<sup>147</sup> *Ibid.*

<sup>148</sup> Relman Morin, "A Police Chief Lasts Eighteen Months: Why No One Sticks in This Position," *Los Angeles Times*, 9 August 1931, K5.

<sup>149</sup> "Wickersham Board on Police Editorial," *Los Angeles Times*, 4 August 1931, A4.

Francisco's Police Chief William Quinn boasted of having purged "crime waves, gangsterism and racketeering" from the city." Lewish Shank, former Indianapolis mayor, resented Vollmer's criticism of hiring his tailor as police chief.<sup>150</sup> Such reactions suggested an intractable tension between national and local approaches to restoring faith in American law enforcement.

Both Roosevelt and Hoover had to respond to the Commission's results, but the governor benefited from not having to answer for federal prohibition as such. Roosevelt scrambled to deal with the Wickersham report, which identified New York as a particularly dysfunctional example of law enforcement. As an immediate response he planned to reprimand the Police Commissioners of his state's biggest cities for the insufficient "results in eliminating the gang element," and wanted "recommendations for the elimination of shootings, machine guns, hold ups."<sup>151</sup> The Hoover administration, on the other hand, hoped to combat crime by stepping up prohibition enforcement. This neglected to address the findings of the very commission the administration had initiated.<sup>152</sup> The Hoover government's decision to conduct an unprecedented federal study into crime eventually exposed so many intractable problems that his team was ill suited to address, problems that a Democratic administration would later prove more inclined to face.

President's Hoover's last full year in office saw a crescendo of problems for federal law enforcement. Prohibition continued to compete with the Depression as a chief campaign issue.<sup>153</sup> At the same time, the Depression dampened the romanticization of gangsters.<sup>154</sup> From March through May 1932, the nation's newspapers widely publicized kidnapping of Charles Augustus Lindbergh, the twenty-month-old son of Charles and Anne Morrow Lindbergh. A panic about kidnapping gripped the nation, and President Hoover's response pushed federal crime authority to the limit. On May 13 he announced the active participation of the federal government's "law enforcement agencies and the several secret services" to bringing the kidnapers to justice, conceding that the "federal government does not have police authority in such crimes."<sup>155</sup> On June 22, Hoover signed the Federal Kidnapping Act into law. Known as the Lindbergh Act, it empowered federal officials to pursue interstate kidnappings, but this only left lingering the questions of the limits of federal authority and the institutional capacity of enforcement.<sup>156</sup>

By 1932 the anti-Volstead message became clearer in the Democratic Party. As the party convention approached, Roosevelt's allies faced off against the Smith forces, who favored a more explicit party condemnation of Volstead.<sup>157</sup> Smith did not appreciate that Roosevelt showed reluctance to turn the election into an unambiguous national referendum of the Eighteenth Amendment.<sup>158</sup> Some on the activist left, like New York social worker Lillian Wald, still maintained the necessity of Prohibition.<sup>159</sup> But more and more Democrats wanted to end Prohibition. They still believed that Prohibition had unleashed crime and corruption that warranted a coordinated national response.

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<sup>150</sup> "Police Chiefs Take Issue," *New York Times*, 2 August 1931, 19.

<sup>151</sup> Memorandum for Mr. Rosenman, 7 August 1931, *FDR Letters*, 209.

<sup>152</sup> Kyvig, *Repealing National Prohibition*, 115.

<sup>153</sup> Lerner, *Dry Manhattan*, 298–99.

<sup>154</sup> Mappen, *Prohibition Gangsters*, 119.

<sup>155</sup> "Hoover's Order Spurs Hunt for Baby's Killers," *Chicago Daily Tribune*, 14 May 1932.

<sup>156</sup> 47 Stat. 326, Ch. 271.

<sup>157</sup> Elliott Roosevelt, *FDR Letters*, 167.

<sup>158</sup> Howell to Roosevelt, 2 December 1931, *FDR Letters*, 229–232.

<sup>159</sup> Wald, "To the Editors of the Outlook," 28 April 1932, LDWP, Microfilm, Reel 26.

In the remarkable political climate of 1932, the standard tactic of accusing the other side of fomenting lawlessness served Roosevelt better than Hoover. In early July, Roosevelt accepted the Democratic Party nomination, unburdened by the constraints of the party's earlier ambivalence toward the problems of prohibition. Unlike John Davis, Roosevelt enjoyed a growing national consensus that agreed with his opposition to prohibition. Unlike Al Smith, he did not face a hostile party. He applauded the convention for clearly articulating that it "wants repeal." He spoke on behalf of a whole country that "wants repeal" and announced that from "this date on the 18th Amendment is doomed." The question that remained was how to protect the rights of states to restrict alcohol and "rightly and morally prevent the return of the saloon."<sup>160</sup> Roosevelt had struck a balance more convincingly than Hoover. The incumbent attempted to attribute the epidemic of lawlessness to "our dual form of government and constitutional provision," a predicament where government agencies needed to demonstrate "independent but coincident action." Lawlessness was one sad consequence. Rejecting repeal of Prohibition and surrender to the organized crime wave, Hoover urged a return of power to the states, so that each state "be given the right to deal with the problem as it may determine, but subject to absolute guarantees in the constitution. . . to protect each state from interference and invasion by its neighbors."<sup>161</sup>

The volatility of partisan ideology in 1932 contributed to the impression that Roosevelt had the more coherent answer. Roosevelt could bridge a new Democratic politics to a reinvigoration of the party's commitment to an older liberalism. In general, his politics expressed this fusion. Roosevelt's running mate accused Hoover of taking America down the "road to socialism."<sup>162</sup> Roosevelt advocated protecting the gold standard, a 25% cut in federal budget and federal salaries, international trade against Republican protectionism, an end to Prohibition. On Prohibition, Roosevelt's platform agreed with both Wilson and the nineteenth-century urban Democratic coalition on the primacy of individual freedom.

Just as important, Roosevelt ran against the status quo of Prohibition, whose legacy burdened Hoover. Many had now turned against Prohibition. The Women's Organization for National Prohibition Reform gave a voice to women reformers who saw the problems Prohibition had caused. Some lifelong Republican progressives now backed Roosevelt. The American Federation of Labor also backed reform.<sup>163</sup>

Bonus Army veterans, hoping for an early payout of their benefits, also turned against Hoover, embracing repeal of the Eighteenth Amendment in their own platform.<sup>164</sup> In late July, Hoover called out federal troops to suppress the Bonus Army. Attorney General William Mitchell attempted to differentiate the "many thousands of honest, law abiding men" in the Bonus Army from the "extraordinary proportion of criminal, communist, and nonveteran elements."<sup>165</sup> But Washington DC's chief of police defied the evacuation order, threatening to

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<sup>160</sup> "Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago," 2 July 1932, APPUCSB.

<sup>161</sup> "Here's Hoover's Dry Law Stand," *New York Times*, 12 August 1932.

<sup>162</sup> See Fred Siegel, "The New Left, The New Right, and the New Deal," in John Patrick Diggins (ed.), *The Liberal Persuasion: Arthur Schlesinger, Jr., and the Challenge of the American Past* (Princeton: Princeton University Press, 2017), 151–163, 152.

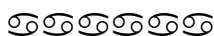
<sup>163</sup> Kyvig, *Repealing National Prohibition*, 116–136, 161.

<sup>164</sup> "Bonus Groups Favor Repeal in 'Platform'," *Washington Post*, 20 June 1932.

<sup>165</sup> "Finds Radicals and Criminals in Bonus Army," *Chicago Daily Tribune*, 12 September 1932.

resign rather than “turn my police force into a military organization.”<sup>166</sup> The Republican Party that had arisen with a bold claim of authority over the states could no longer maintain its chain of command in the nation’s capital.

By 1932 one could not ignore the ideological and institutional crises that crime presented to the American nation-state. Close to the eve of the election, Hoover tried once more to accuse the wet candidate of insufficient attention to lawlessness. Campaigning in the progressive hotbed of Madison, Wisconsin, on November 4, Hoover blamed Governor Roosevelt for failing to address the gangster problem.<sup>167</sup> Less than a week later Roosevelt carried forty-two states.



The struggle for legitimacy looms over American political and legal history from 1865 to 1933. Ambiguity of purpose and contested legitimacy long plagued national law enforcement. Control of the South and West, management of the industrializing cities and resulting class conflict, reform movements, the rise of the United States as a global power, and unprecedented technological breakthroughs often pushed to the forefront questions of crime and punishment. If authorities saw antebellum crime as local, more modern approaches to crime stressed the national, universal, and scientific—even as modernity looked very different depending on place. Cohesion around criminological theory or crime-and-punishment agendas had often broken on regional, ideological, or partisan grounds. In the early 1930s, the conspicuous rise in organized crime alongside the Depression brought urgency to longstanding institutional and ideological problems.

Those who sought to unify the United States always relied heavily on criminal justice and always regarded their principal adversary as lawlessness. In every case a political coalition carried the vision forward and achieved national power with somewhat abortive results. The Northern Republicans’ Yankee Leviathan, seeking a national regime of corporate liberalism and free labor, clashed with recalcitrant white supremacy in the south and industrial workers nationwide, and in the process itself became accused of fomenting lawlessness.<sup>168</sup> The Progressives had a somewhat different vision, deeply interested in social order and criminal justice reform, much of which capsized at the highest point of Progressive national power. The advocates of Prohibition comprised a motley crew who had somehow done the unthinkable—the ultimate experiment in correcting lawlessness from the bottom up. Instead, their agenda only multiplied the contradictions of law and order, of political legitimacy, and of political ideology.

This national legacy of lawlessness, of a deeply structural crisis of legitimacy, greeted Roosevelt as he inherited the presidency. Repealing Prohibition was a necessary part of Roosevelt’s mandate for reform, but it was hardly sufficient. In the short term, voters expected him to address not only the Depression but the surge of organized crime and kidnappings. In the longer term, the very legitimacy of the federal state hung in the balance. This legitimacy was

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<sup>166</sup> “Eviction of Bonus Army from Capital Rescinded,” *LA Times*, 23 July 1932.

<sup>167</sup> “Hoover at Madison Assails Roosevelt: Decrying Crime in Our Cities, He Charges Governor Has Failed on Gangster Problem,” *New York Times*, 6 November 1932.

<sup>168</sup> Mostly in reference to race, class, and socialist politics, Richard Franklin Bense argues in *Yankee Leviathan* that “the enduring American state-building problem of inadequate political and economic integration. . . persisted until the New Deal restructuring of the political economy.” Bense, *Yankee Leviathan: The Origins of Central State Authority in America, 1859–1877* (New York: Cambridge University Press, 1990), 433.

central to his full domestic agenda and so contested for generations among so many of Roosevelt's most important constituents. Much of this legitimacy concerned the authority and ability to impose law and order, to wage a war on crime even as Prohibition ended. This would require an unprecedented achievement in national unity and a transformation of the liberal politics Roosevelt occupied. The political, ideological, institutional, class, and regional divisions surrounding law and order threatened to undercut Roosevelt's vision for the future of America, unless he somehow managed to succeed where the Reconstructionist and Gilded Age Republicans and classical liberals, Progressive reformers, and Prohibitionist presidents had all failed.

## Chapter 2

### *Perfecting the Machinery*

Within his first two years in office, President Franklin D. Roosevelt not only stabilized but revolutionized American crime control. He entered the White House in the last year of alcohol prohibition, amidst a tumultuous political atmosphere that spelled an uncertain future for law enforcement and national authority. By the end of 1934, Roosevelt and Attorney General Homer Cummings broke the back of organized crime, eased longstanding tensions between federal agencies, and oversaw the largest expansion of the national criminal code to date. This last achievement alone amounted to one of the broadest and most permanent expansions of federal power in American history, which was all the more remarkable given how uncontroversial it was.

Starting in the 1930s, commentators have acknowledged these unmistakable changes but have not explored the full implications. Roosevelt's contemporaries recognized a stark break with the past. As journalist Herbert Corey argued in his 1936 book *Farewell, Mr. Gangster: America's War on Crime*, the New Deal brought real action where its predecessors and critics offered empty talk. President Herbert Hoover spent a half-million dollars on the Wickersham crime commission, but "this report got nowhere at all," explained Corey. "It was a learned essay and no more." Roosevelt and Cummings, on the other hand, produced results.<sup>169</sup> Indeed, although Corey believed that America was "still the most lawless nation," he praised the new national leadership in law enforcement, noting that "Governors are doing as Attorney-General Homer Cummings did and are calling conferences on crime."<sup>170</sup>

Improved cooperation between the national government and states, whose relationship suffered poor accountability and clumsy coordination in the 1920s, would define the future of criminal justice, but in the 1930s Corey could not have known that for certain. Even with the benefit of hindsight, recent historians have also neglected to grapple with the full impact of Roosevelt's first two years on crime and punishment. The conventional periodization downplays the revolutionary change. Historians depict the era of gangsters, the high-profile Lindbergh kidnapping, and the FBI's war on crime as starting under Herbert Hoover and ending in Roosevelt's first term. The New Deal, at best, provided an activist catalyst to the momentum that was in play when Roosevelt inherited the machinery of law enforcement. They often see 1934 as the peak of this policy intersection, as the criminal code ballooned, FBI powers expanded, Alcatraz opened, and Cummings hosted a major national crime conference.<sup>171</sup>

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<sup>169</sup> Herbert Corey, *Farewell, Mr. Gangster: America's War on Crime* (New York: D. Appleton-Century Company, 1936), 6, 7. As Corey notes, Roosevelt and Cummings empowered the Division of Investigation, whose documents Corey consulted in writing his book, and whose director, J. Edgar Hoover, wrote Corey's Foreword. Hoover was "flattered" by Corey's book, and appreciated the attention to the need for interagency cooperation. J. Edgar Hoover's foreword in *ibid.*, v.

<sup>170</sup> Corey, *Farewell, Mr. Gangster*, 3. By 1936 the Division was called the Bureau of Investigation.

<sup>171</sup> In *Crime and Punishment in American History* (New York: Basic Books, 1993), Lawrence M. Friedman fixates on 1934 as a big year for crime and punishment and the FBI's expansion of power, for which he almost euphemistically writes that "Franklin Roosevelt's administration must shoulder some of the responsibility for boosting" (271). Michael Willrich looks to the many statutes of 1934 along with the 1937 Marijuana Tax Act as together "greatly increas[ing] the criminal jurisdiction of the federal government and especially the Bureau of Investigation" and insightfully notes that the "federal government never seriously threatened to seize control of

But this mere listing of criminal justice flashpoints downplays the radical transformations of 1933 and 1934, and their meaning in the longer sweep of American history. In those years the Roosevelt administration finally resolved the multi-generational crisis of national law-enforcement legitimacy.<sup>172</sup> From Reconstruction through the Gilded Age, white Southerners and then organized labor deeply distrusted federal law enforcers. Progressive reformers had only achieved a convincing national mobilization with the repression of World War I and the Red Scare, a Pyrrhic victory that exacerbated divides between middle-class liberals and the left. The 1920s Republicans inherited these instruments of repression, directed against immigrants, radicals, and bootleggers, and their enforcement of Prohibition further exposed deep cultural divides. The Great Depression only amplified the broad skepticism, and uncertainty ominously loomed over the fate of America's political and institutional balance. Uneasy relationships between Treasury and Justice enforcers, between federal and state investigators, and between prohibitionists and wets welcomed Roosevelt as he took presidential office, tasked with the mandate to legalize liquor, combat corruption, defeat the high-profile gangsters and kidnappers terrorizing middle America, all while ameliorating the deep economic crisis.<sup>173</sup> These challenges coincided with his larger political project of redefining liberalism—to attenuate the classical liberal dedication to individual rights, market economics, and limited government, while not abandoning it altogether, and while avoiding the unsustainable and utopian designs of the progressives and prohibitionists. His liberalism would push the boundaries of government power but aimed to acclimate the culture to this change, to encourage a tacit societal consent for a more ambitious liberal governance. For Roosevelt's activist liberalism to succeed, for the New Deal

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criminal justice from the state and local governments," but has very little secondary literature to draw on in contemplating in detail the longstanding implications for federalism. See Willrich, "Criminal Justice in the United States," in Michael Grossberg and Christopher Tomlins, eds., *The Cambridge History of Law in America: Volume III: The Twentieth Century and After (1920–)* (Cambridge and New York: Cambridge University Press, 2008), 210–211. The crime wave and FBI response in Roosevelt's first two years as president is one of the few New Deal war on crime stories that has captivated both popular and academic historians. Bryan Burrough identifies these as core years of modern crime and punishment in *Public Enemies: America's Greatest Crime Wave and the Birth of the FBI, 1933–1934* (New York: Penguin Press, 2004). The cultural resonance of organized crime and a focus on its intersection with the early New Deal and state building is the subject of Clare Potter's academic monograph, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick, NJ: Rutgers University Press, 1998). Potter emphasizes the first Roosevelt term as the apex of the New Deal war on crime, rather than as the beginning of a new transformative coalition with enduring institutional relevance. David E. Ruth minimizes the New Deal's impact, as it "aimed at the ills of the entire society in which cities seemed no sicker than small towns or the countryside," in his book with a fairly conventional periodization, *Inventing the Public Enemy: The Gangster in American Culture, 1918–1934* (Chicago: Chicago University Press, 1996), 8. Other works that distinguish the early 1930s FBI war on crime from the later 1930s national security priorities include Athan Theoharis, *The FBI & American History: A Brief Critical History* (Lawrence, KS: University Press of Kansas, 2004) and Kenneth O'Reilly, "A New Deal for the FBI," "A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security," *The Journal of American History* 69, no. 3 (1982): 638–58.

<sup>172</sup> See "The Most Lawless Nation," chapter 1 of this dissertation, for an elaboration of this history.

<sup>173</sup> David Kennedy casts repeal of prohibition as a repudiation of one "of the most powerful political lobbies in Washington." Kennedy, *Freedom from Fear: The American People in Depression and War, 1929–1945* (Oxford University Press, 1999), 139. Lisa McGirr's *The War on Alcohol: Prohibition and the Rise of the American State* (W.W. Norton, 2016), 245–49, aptly demonstrates how alcohol prohibition both constructed the federal state and mobilized the ideological backlash that redirected its trajectory in the New Deal. She invites the question of whether the 1930s witnessed a more sustainable state-building project, dependent on a liberal reformist energy newly harmonized with carceral power.



vision to prevail, America's core law and order functions required the legitimation that every previous political constellation had failed to produce.<sup>174</sup>

Roosevelt and Cummings achieved this legitimation and did much more. They salvaged, retooled, and refined the beleaguered law-enforcement machinery they inherited, an astonishing feat in American political development. Rather than resulting naturally from the confluence of activist liberalism and the early 1930s crime panics, Roosevelt and Cummings's political accomplishment was both highly contingent and profoundly deliberate, a fortunate and purposeful project of grand social significance. Amidst the law-and-order panic and a cacophony of conflicting demands that they exercise dictatorial control against criminals and restore the traditional constitutional balance from before Prohibition, the administration built a war on crime coalition that united previously opposing elements. To balance competing political pressures, they produced a delicate institutional and political equilibrium while setting out to redefine crime as a much broader category of federally legible wrongdoing. Beyond the popularly feared organized criminals, the New Dealers widened their potential targets to enfranchise previously marginalized factions into the national campaign against crime. Organized labor began to hope that the war on crime might protect them from rapacious industry while business interests hoped for strikebreaking.<sup>175</sup> African-Americans and their allies began to wonder if Cummings's domestic war might eventually target lynching, while Jim Crow Democrats were reassured that Southern practices would remain untouched.<sup>176</sup> Along with assuring both the Treasury and Justice Departments of their secure future in criminal enforcement, the war on crime thus gave key components of the New Deal coalition hope that federal law enforcement could one day work for them. This war on crime coalition would cooperate in novel ways to sustain and perfect the machinery of American law enforcement for the rest of the decade, the machinery that would develop into the permanent security-state and carceral-state apparatuses of the postwar period.

It is tempting to take for granted the current institutional shape of the American government, so deeply reliant on both the novelties of the New Deal and the modernization of law and order. In fact, the New Deal and federal war and crime were mutually constitutive from the beginning. The years 1933 and 1934 were crucial to constructing the modern consensus in both law enforcement and American governance in general. The conspicuous criminality at the intersection of Prohibition and Depression spoke to two fundamentally threatening possibilities—that Roosevelt's mandate for governance would collapse, as had the mandate for so many political coalitions that had attempted to impose order; or that a project as extreme and unsustainable as Prohibition or worse would emerge. Within a year Roosevelt and his team found their bearings, embarking on a path of modified liberalism, working across ideological and

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<sup>174</sup> Wendy L. Wall identifies the rise of a national consensus, bridging longstanding ideological divisions, in the mid-1930s in *Inventing the 'American Way': The Politics of Consensus from the New Deal to the Civil Rights Movement* (Oxford and New York: Oxford University Press, 2008). Looking at crime and punishment, I argue, refocuses our attention a few years earlier.

<sup>175</sup> Historians have engaged in critical examination of labor's premature optimism in light of Roosevelt's actual priorities in maintaining a "balanced" approach to economic classes at least since William E. Leuchtenburg, *Franklin Roosevelt and the New Deal, 1932–1940* (New York: Harper & Row, 1963).

<sup>176</sup> Scholars focused on political economy may agree with Alan Brinkley that the New Deal's consolidation and redefinition of liberalism tended to overlook "issues of race, ethnicity, family, gender, and personal behavior—in part because they feared the cultural and political battles such issues had produced in the 1920s." Focusing on questions of crime and punishment allows for a new look at how constituents with conflicting visions for cultural and social identity came together in the project of 1930s political legitimation. Brinkley, *The End of Reform*, 9.

institutional lines to reassert the federal government's authority over lawlessness. The next year Roosevelt and Cummings consolidated an entirely new consensus around crime control, one that would sign off on a whole slate of legislation unthinkable in a previous era. Calls for extremism raised the stakes while widening the possibilities for action and making the New Dealers' activist liberalism appear relatively moderate. By the end of 1934, it became clear that the administration's solutions to the problem of crime and lawlessness would shape the trajectory of liberalism, crime and punishment, and the New Deal state itself. Nineteen-thirty-four was more than a "radical moment" in law and order. It marked the end of the last great nineteenth-century quandary for American authority, as well as the beginning of a radically new era in liberal politics and governance.<sup>177</sup>

### Crisis

The same month that Roosevelt took the oath of office audiences gleefully enjoyed a new film celebrating the prospect of an American dictator. In *Gabriel over the White House*, bankrolled by William Randolph Hearst, actor Walter Huston portrayed President Judson Hammond, at first a do-nothing stand-in for Warren G. Harding or Herbert Hoover who becomes emboldened and undertakes a sweeping program of economic nationalization to bring relief. In response to an impeachment attempt, Hammond dissolves Congress and establishes martial law. Then, in response to an assassination attempt, he relies on a new federal police force and military commissions, and lines up bootleggers for summary execution. The film had profound and unmistakable resonances with the political moment. A critic in the *Chicago Daily Tribune* declared that "If Mr. Roosevelt ever folds up or runs out of ideas—there seems no likelihood of it—I'm all for drafting Mr. Walter Huston as President Extraordinary and giving him free hand to do just what he does in this picture."<sup>178</sup>

Roosevelt could not ignore the ideological and institutional crises that crime and lawlessness presented to the American state. He himself had survived an assassination attempt.<sup>179</sup> Giuseppe Zangara, who in February tried to assassinate Roosevelt and killed Chicago's mayor, received a death sentence in March. The state judge used the opportunity to argue for new national laws against firearms, a matter of criminal law still handled by the states.<sup>180</sup> Inside and outside government sounded calls for the federal government finally to do something significant to curb lawlessness, including many proposals less measured than the judge's. For a president resisting the urge to mimic Hammond's dictatorship, striking the right balance posed a challenge.

Roosevelt was not the first to fear that lawlessness—whether in the form of organized crime or corporate greed—threatened to turn Americans toward extremism. Herbert Hoover shared a progressive understanding of the place of lawlessness in America's struggle for both economic

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<sup>177</sup> Ira Katznelson identifies the "radical moment" in Roosevelt's efforts to navigate American liberalism through the extremist atmosphere of his first term, producing a groundbreaking but short-lived experiment in collectivism with the NIRA. Katznelson, *Fear Itself*, 234–238. The crime policies of 1933 and 1934 were predicated on as much unprecedented cooperation but with more enduring structural results.

<sup>178</sup> "Critic Issues an Appeal to See This Film: 'Gabriel Over the White House'," *Chicago Daily Tribune*, 31 March 1933.

<sup>179</sup> See "The Most Lawless Nation," chapter 1 of this dissertation.

<sup>180</sup> "Zangara Given Death Penalty by Miami Judge: Assassin Rages in Court When He Learns Fate," *Chicago Daily Tribune*, 11 March 1933.

justice and liberal democracy. In his last month as president, Hoover wrote to Attorney General William Mitchell asking him to look into the Senate Committee on Banking and Finance. He identified the scandalous failure of federal regulatory institutions as contributing “more to the growth of Communism and Socialism in the United States than the efforts of all the followers of Karl Marx and Lenin in the world.” Worse than Al Capone were “banksters who rob the poor,” and these “traitors to our institutions and national ideas” undermined “confidence [which would] break down the whole system.”<sup>181</sup> Such fears continued to define the contours of American policy as one administration gave way to the next.

Now, in the Spring of 1933, the Roosevelt administration inherited this institutional and ideological crisis, the mandate to repress lawlessness, and a precariously constructed network of law-enforcement machinery. The country, already clamoring for economic relief, demanded a reprieve from a national crime wave.<sup>182</sup> The homicide rate peaked in 1933, and almost one out of ten thousand Americans fell victim to murder that year, a nearly 20% increase over the beginning of the Depression.<sup>183</sup> National coverage of a homicide rate approximately twice the figure at the beginning of the century would continue into the next year.<sup>184</sup> Even the international press in 1933 fixated on the administration’s plan to address the “crime wave” and “wipe. . . out” the “enemies of the public.”<sup>185</sup> The mandate to end Prohibition and the lack of consensus on how to address the corruption and crime it had bred guaranteed an atmosphere of political and institutional volatility.

The legacies of a Republican government alongside the unwinding of Prohibition, the extremist political atmosphere, and the possibilities for expanding the war on crime to include new classes of subjects, meant both great uncertainty and opportunity in the short-term. At the same time, the long-standing crisis of law-and-order legitimacy, tracing back to the nineteenth century, posed problems for any program of vast federal expansion. Thanks in large part to the fortuitous placement of Homer Cummings as Attorney General, the administration developed a distinctively New Deal approach by the end of 1933 that showed promise in addressing both the short-term and long-term predicaments posed by the law-and-order crisis.

The organized crime and corruption attending to Prohibition had mixed with the Depression to cause a national panic that the Roosevelt administration knew it could not instantly address. The wets had consistently argued that Prohibition drove profits to the underworld, fueling black market violence and financing political corruption. They saw the recent “sharp increase” in kidnapping and racketeering as further evidence.<sup>186</sup> They argued that Prohibition could not stop drinking, and indeed its impotence only debased respect for the law. The critique of inefficacy invited a coy response from the more consistent law-and-order crowd. Former Anti-Saloon

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<sup>181</sup> “Hoover to Cummings,” 23 February 1933, PHSC Box 114, Folder: Herbert Hoover.

<sup>182</sup> Bryan Burrough emphasizes that Roosevelt took office as “kidnapping stories thronged front pages across the country” and had to govern during the “the Great Crime Wave of 1933–1934. Burrough, *Public Enemies*, 14, 16.

<sup>183</sup> Justice Research and Statistics Association, *Crime and Justice Atlas 2000*, U.S. Department of Justice, 38. The FBI’s own statistics, meanwhile, suggested similar rise, with non-negligent homicide for half the year, January to June 1933, reaching 3.3 out of 100,000 population, as compared to 2.8 out of 100,000 from January to June 1931. Contrast Uniform Crime Reports, Volume 4, Number 2 (July 1933), Table 1, to Uniform Crime Reports, Volume 2, Number 7 (July 1931), “Percentage Table of Part I Offenses, p. 5.

<sup>184</sup> “Slayings in Nation Up 100% since 1900,” *New York Times*, 27 April 1934.

<sup>185</sup> “Moley Confers with President on Crime Wave,” *The China Press*, 4 August 1933.

<sup>186</sup> Getchell to Roosevelt, 13 July 1933, PHSC Box 213.

League stalwart and Democratic Congressman William D. Upshaw asked Roosevelt rhetorically, if flagrant violations discredited alcohol prohibition, why not repeal kidnapping statutes in hopes of reducing kidnapping?<sup>187</sup> The glibness of political talking points aside, dry Americans did pose a challenging problem: the disrespect for the law had seemingly spread to include violence and property crimes, and whatever one might say about Prohibition's counterproductive relationship to law and order, now the anti-prohibitionists had to address the problems that had exploded over the last decade. Having argued that the Volstead Act fueled crime, the wets in the new administration became more tepid about their promises of what ending Prohibition would accomplish. Reporter and close Roosevelt adviser Louis Howe began signaling that ending Prohibition might also lead to a crime surge, as bootleggers shifted attention to "blackmail, kidnapping and counterfeiting," a problem Howe warned that local government could not sufficiently address. The irony inspired one letter writer from Hartford, Connecticut, to quip to the *Washington Post* that "Now that the wets believe repeal to be imminent it is astonishing to note their almost daily repudiation of the golden promises of yesterday."<sup>188</sup>

Haunting the Roosevelt administration from its beginning, a conspicuous uptick in gangsterism had begun shortly after the Stock Market Crash. The gruesome Lindbergh kidnapping remained unsolved when Roosevelt took office. Larger-than-life criminals made national headlines. Intensified by the Depression, well-publicized robbery and banditry characterized the last years of Prohibition, and the convenient logic that black markets promoted violence did not always apply to these crimes. Nor did the federal government have the legal means to address bank robbery. Small teams of roaming bandits, such as in the famous Barker-Karpis Gang led by Fred Barker and Alvin "Creepy" Karpis, whom authorities claimed fell under the leadership of Ma Barker, conducted a string of robberies and kidnappings that began in 1931. On May 19, 1933, "Handsome" John Dillinger was paroled from Indiana state prison, and the next month began a string of high-profile robberies. He assembled the Dillinger Gang, which undertook a series of bank robberies into the next year. The gang included "Baby Face" Nelson, another nationally recognizable character who began robbing banks in 1930. Other celebrity bandits included George "Machine Gun" Kelly, Frank "Jelly" Nash, and Charles "Pretty Boy" Floyd. Some of the most sensational stories colorfully depicted the escapades of Bonnie Elizabeth Parker and Clyde Chestnut Barrow, whose rampage of theft and violence took them up and down the central United States.<sup>189</sup>

Another short-term problem centered on the politics of personnel. One politically salient question was how to contend with the legacies of the Bureau of Investigation. J. Edgar Hoover embodied the Bureau of the previous decade, and many admired his reputation. He had endorsements for reappointment from many police officials and George Wickersham, the Republican former Attorney General whom President Herbert Hoover had entrusted with the national crime commission. The American Institute of Criminal Law and Criminology and International Association of Chiefs of Police supported retaining J. Edgar Hoover. So did recently retired police chief August Vollmer, the paragon of progressive police reform. Other endorsements reflected the country's regional and partisan diversity. The cause of reappointing Hoover brought together Democratic Congressmen John L. McMillan and John J. McSwain from South Carolina, and John McCormack from Massachusetts, along with Republican Congressmen

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<sup>187</sup> William D. Upshaw to Roosevelt, 28 August 1933, OF117, Folder: Crime 1933.

<sup>188</sup> "Wets Fear Crime Wave Following Repeal of Eighteenth Amendment," *Washington Post*, 1 March 1933.

<sup>189</sup> Theoharis, *FBI & American Democracy*, 40–41.

Harry Estep from Pennsylvania and William Lemke from North Dakota. Michigan's representatives Claude E. Cady, a Democrat, and Jesse Wolcott, a Republican, also concurred that Hoover should remain. Democratic Senators Hubert Stephens from Mississippi and William King of Utah agreed, along with Republican Senator Gerald Nye from North Dakota.<sup>190</sup>

But not everyone liked J. Edgar Hoover. Many progressives and many on the left associated him with the conservative repression of the 1920s. As it turned out, a tragedy brought good fortune to the Roosevelt administration's cooperation with Hoover, as well as with other legacy personnel from the Republican 1920s, with longstanding implications for how the administration managed and expanded the war on crime. Roosevelt had originally picked for Attorney General Montana Senator Thomas J. Walsh, a Democratic Party leader who embodied early-twentieth-century Progressivism. He supported Wilsonianism abroad, women's suffrage, child labor restrictions, and alcohol prohibition, which he promised to enforce vigorously so long as remained on the books. He loudly criticized the Palmer Raids and led the investigations into Harding's Tea Pot Dome scandal. Walsh did not much care for J. Edgar Hoover, and planned on replacing him upon taking over the Justice Department. But it was not to be. On March 2, 1933, while on a train riding to Roosevelt's inauguration, Walsh died of a heart attack.<sup>191</sup>

Roosevelt asked Homer Cummings, a high-profile Democrat and associate from the days of the Wilson administration, to delay his planned departure to become Governor General of the Philippines, and instead temporarily run the Justice Department. Cummings took the role, eventually to become permanent Attorney General until 1939. He was thoroughly loyal to the Democratic Party and to Roosevelt, but he also got along better than with J. Edgar Hoover than Walsh did. A former prosecutor, Cummings had anti-crime bona-fides, but without the corrupting taint common in Prohibition enforcement. Even as a prosecutor, he won the respect of progressives concerned about criminal justice abuses when, in 1924, despite having a confession and murder weapon, he undertook an investigation that exculpated defendant Harold Israel, a vagrant accused of murdering a priest. He considered it "just as important for a state's attorney to use the great powers of his office to protect the innocent as it is to convict the guilty."<sup>192</sup> Cummings's concern about lawlessness in enforcement deflected the typical progressive reformers' critiques of war on crime overreach.

For the Justice Department itself, many basic questions lingered. Its sheer size was one issue. Cummings intoned that each of the Department's subdivisions had become "as large, even as important, as the whole Attorney General's office was a generation ago."<sup>193</sup> Cummings had seven assistant Attorneys General, about a dozen divisions, as well as the Directors of Prohibition, the Bureau of Investigation, and the Bureau of Prisons. The judiciary, under the Justice Department's auspices, had exploded with activity. Thanks in part to Prohibition, the district courts had 126,363 cases for the year ending in June 1932—up from 22,541 in 1914.<sup>194</sup>

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<sup>190</sup> Memo for Mr. Stanley, 1 August 1933, PHSC Box 114, Folder: J. Edgar Hoover.

<sup>191</sup> Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (New York: W.W. Norton, 2001), 153; "Walsh Will Enforce Dry Law So Long as It Lasts, He Says," *New York Times*, 2 March 1933; "Walsh Was Noted for Fearlessness," *New York Times*, 3 March 1933.

<sup>192</sup> "Cummings Sees the Law as a Living Thing," *New York Times*, 3 September 1933.

<sup>193</sup> Speech by Cummings, Dinner Given at Stratfield Hotel, Bridgeport Connecticut, 15 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>194</sup> Broadcast over the Network of the National Broadcasting Company, National Radio Forum Arranged by Washington Star, 24 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

The ambiguities of jurisdiction presented challenges. Meanwhile, the demands of austerity meant that Cummings had to labor to cut costs.<sup>195</sup>

The question of what to do with J. Edgar Hoover and the Justice Department spoke to something deeper. From the beginning, Roosevelt and Cummings confronted problems of law and order that marked the longer-term crisis of institutional uncertainty and the fate of American government. Cummings recognized these crises as intimately intertwined, sharing deep roots. Just over one month into his new job, Cummings gave a speech in Bridgeport, Connecticut, that situated the Justice Department's predicament in the greater context of America's crises. Budgets were out of balance while taxes kept down industry. The "heritage of liberalism," marked by restrained government, had served America well but anachronistic legal principles had obstructed progressive reform. Underneath the political battle lines lay bigger problems, social and institutional. Cummings lamented that America's "governmental machinery" had fallen "out of adjustment."<sup>196</sup>

As Cummings had suggested, these institutional questions implicated the history of liberalism. Ideological crises abounded. Two of the Democratic Party's most important constituencies, the white South and urban labor, maintained some skepticism of domestic power, particularly in law enforcement. The failures of alcohol prohibition implicated Progressivism, a middle-class urban movement, and its agenda did not fit comfortably well with the rural South or the working class. Attitudes about government and its machinery both needed "adjustment" for Cummings's agenda to work.

Roosevelt and Cummings also confronted the question of political extremism—and how radical a response was justified in a period when many governments and intellectuals embraced communism and fascism. Calls for a radical change in crime policy tended to stress the urgency of the threat. Lawlessness endangered the very fabric of America, and needed swift, bold remedies. The Roosevelt administration characterized the Depression as a national security threat, inviting a broadening of the concept to accommodate domestic matters, which soon included crime. In his first inaugural, Roosevelt called for "broad Executive power to wage a war against the [economic] emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe."<sup>197</sup> The administration early on undertook action at the intersection of crime and national security. Cummings witnessed the fusing of domestic detention power and national defense. At the president's request he readied for Roosevelt a list of military prisoners, "deportable aliens," and convicts under the Espionage Act.<sup>198</sup> Another tabulated list came out the next year.<sup>199</sup> The two spent their first year in office contemplating amnesty for people who violated laws during World War I and determining which aliens were subject to deportation. Cummings would later furnish a list of 72 aliens subject to deportation.<sup>200</sup>

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<sup>195</sup> Attorney General to President, February 1 1934, OF10 Box 2, Folder: DOJ Jan–Apr 1934.

<sup>196</sup> Speech by Cummings, Dinner Given at Stratfield Hotel, Bridgeport Connecticut, 15 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>197</sup> Franklin D. Roosevelt, Inaugural Address, 4 March 1933, APPUCSB.

<sup>198</sup> Attorney General, 1 June 1933, OF10 Box 1: DOJ June–August 1933.

<sup>199</sup> Executive Assistant to the Attorney General, 19 April 1934, OF10 Box 2, Folder: DOJ, January–April 1934.

<sup>200</sup> Attorney General, 17 September 1934, OF10 Box 2: Folder: DOJ July–Oct 1934; Attorney General, 11 November 1933, OF10, Folder: DOJ Sept–DEC 1933. The administration meanwhile continued the Hoover-era policy of Mexican "repatriation," in which perhaps hundreds of thousands, many of them U.S. citizens, were deported to Mexico. See Fernando Saúl and Alanís Enciso, *They Should Stay There: The Story of Mexican Migration and Repatriation during the Great Depression* (Chapel Hill: University of North Carolina Press, 2017).

The leveraging of Justice Department power as both a national security and criminal justice issue spoke to the general broadening of categories the New Deal state enabled. Roosevelt and Cummings promised to stretch the definition of criminality, as a policy target of federal intervention. Of course the usual suspects would continue to be targeted by state governments with the assistance of federal officials. Mostly men of color and poor vagrants would constitute the bulk of the criminal classes. But organized crime presented an opportunity to include ethnic whites, while the fear of roving bandits was directed toward the assimilated, white, working- and middle-class deviants who were terrorizing middle America, a group so frightening because it appeared they could come from anywhere. The New Deal added to this, at least rhetorically, those whose economic crimes violated the public trust, and unified the entire project of combatting lawlessness as a mainstream concern in the name of American security and national welfare.

The holistic approach to securing the country enjoyed broad appeal. If Roosevelt argued that the Depression was akin to the threat posed by a foreign war, many Americans saw the problem of crime in the same way. Roosevelt and his administration received numerous appeals to tackle crime as an existential threat. Fred Clarke wanted to “inflict death for the slightest violation.” He appealed to populist reasoning, arguing that the rich Lindberghs should not be the only ones protected by vigorous law.<sup>201</sup> Other proposals Roosevelt received included regular searches of homes every Sunday, and “death without a jury trial” for those carrying unregistered guns. American cities needed to be “purified by a great leader, a fearless man, with . . . a forceful hand.”<sup>202</sup> One pamphlet, “Uncle Sam Start after Crime,” suggested a declaration of a state of war, mandatory universal bearing of arms under strict regulation, with those carrying arms against regulation deemed guilty until proven innocent. Since fifty thousand good American men had died to secure world peace in the Great War, America should not “hesitate to sacrifice, if necessary, double that number of our worst men for the sake of peace here at home.”<sup>203</sup> Richard Lloyd Jones of the *Tulsa Tribune* drew a parallel between the kidnapers and the Sioux Indians executed during the Civil War. “When Indians kidnapped and massacred our bold pioneers on the frontier we put the army to work to capture and punish violators of our laws,” he reminded Roosevelt. “Today kidnapping is growing alarmingly and our army is idle.” He blamed Cummings for wasting time playing golf and urged the Departments of War and Justice to collaborate against the threat.<sup>204</sup>

Adopting the most extreme proposals would push the United States outside the bounds of liberalism—that is, a liberalism as broadly conceived so as to accommodate a progressive activist agenda like the New Deal while still maintaining a basic deference to property rights, civil liberties, and due process of law. Roosevelt took on the active project of redefining liberalism in this broad sense. The specter of extremism guided the New Dealers in pondering the boundaries of their domestic policy, and this included crime. Many Americans clamored for a more militant, more literal war on crime than the New Dealers had the inclination to deliver. In Detroit, Father Charles Coughlin advocated, in addition to a radical economic program, a crackdown on lawlessness. With many others, Coughlin blamed Prohibition for intensifying organized crime, but, moved by the Lindbergh kidnapping, he had called for a

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<sup>201</sup> Fred Clarke to President Roosevelt, 24 July 1933, OF117, Folder: Crime 1933.

<sup>202</sup> Dear Sir (Attorney General), 12 September 1933, OF117, Folder: Crime 1933.

<sup>203</sup> To Howe, August 4 1933, OF117, Folder: Crime 1933.

<sup>204</sup> Richard Lloyd Jones to Roosevelt, 25 July 1933, OF117, Folder: Crime 1933.

campaign “to eradicate the gangster.”<sup>205</sup> Inspired by his crime plan, twenty-eight hundred telegrams went to the White House.<sup>206</sup> Roosevelt found himself inundated by recommendations, some seemingly reasonable. Personal letters implored Roosevelt to launch the creation of a new federal police force.<sup>207</sup> Some focused on the problem of corrupt judges.<sup>208</sup> Other citizens had secret plans to stop crime they promised to divulge if they got a private meeting.<sup>209</sup>

The administration navigated an activist world, which meant differentiating vigilantes from welcome volunteers. Citizens groups enlisted themselves in support of New Deal-style law and order. The American Citizens’ League regarded itself a semi-militaristic organization, geared toward opposing communism and securing the success of the National Recovery Act. Roosevelt, upon reflecting on the group’s bylaws, expressed provisional approval.<sup>210</sup> Populist and extremist agitators were calling for action. The Crusaders, a citizens group, held a mass-meeting at Carnegie Hall in June, hoping the President would connect remotely.<sup>211</sup> Joseph Nelson at the Chicago Compliance Board at the National Recovery Administration contemplated a new voluntary association modeled on the wartime American Protective League.<sup>212</sup> The Grand Commander of the Protective Order of Police wanted Roosevelt’s endorsement, against which J. Edgar Hoover cautioned.<sup>213</sup> The extremist appeals revealed how comparatively moderate and cohesive was Cummings’s war on crime coalition.

Roosevelt’s predicament of reconciling liberalism and organized labor at a time of unrest and radicalism extended to, and indeed arose from, the problem of law and order. Whereas in the past the federal government had generally sided against labor radicalism, the New Deal made a new dynamic possible. Conflicts over labor appealed to the administration to exercise power in different directions, but all toward the common destination of enhanced federal power. Workers saw false accusations and convictions of labor organizers as one of the main unjust tools exercised by capital. The Roosevelt administration offered the possibility that the federal government might prove less captured by industry than the states. Although such activists as Roger Baldwin of the American Civil Liberties Union expressed skepticism, others held out hope.<sup>214</sup> The Socialist Party of America pled Roosevelt “to intercede on behalf of justice fair play on basis facts disclosed by Wilson and Wickersham investigations,” pointing to the 1916 Thomas Mooney trial as evidence “that California Justice is dead.”<sup>215</sup> Racial politics too drove

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<sup>205</sup> “Intermediary Plan Decried by Pastor,” *New York Times*, 7 March 1932; “Detroit Priest Calls the Death Challenge to Wipe Out Gangster,” *New York Times*, May 13 1932.

<sup>206</sup> Attorney General, 29 March 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>207</sup> Getchell to President, 13 July 1933, PHSC, Box 213.

<sup>208</sup> Robert J Caldwell to Sir, 29 July 1933, OF117, Folder: Crime 1933.

<sup>209</sup> W.T. Johns to Roosevelt, July 28 1933, OF117, Folder: Crime 1933.

<sup>210</sup> Miller, Charles A, National General–Secretary, American Citizens’ League, Reading, PA, 30 August 1933, OF10 Box 1, Folder: DOJ June–August 1933.

<sup>211</sup> Fred G. Clark (The Crusaders) to Louis Howe, 26 May 1933, OF117, Folder: Crime 1933.

<sup>212</sup> Joseph A Nelson (Chicago Compliance Board—NRA) OF10 Box 2, Folder: DOJA, January–April 1934.

<sup>213</sup> Dixon, Walter L., 23 May 1934, OF10 Box 2, Folder: DOJA, May–June 1934.

<sup>214</sup> Roger Baldwin thought that “Mr. Roosevelt, despite himself, is bound by the enormous power of property interest and that his weight will be thrown in the end (as in my judgment it is now) toward the building up of monopoly capital to an even stronger position.” Baldwin to Edward M. Winston, 6 November 1934, RBP Box 10, Folder 9.

<sup>215</sup> OF10 Box 1, Folders: DOJ 4 May 1933, March–May 1933.



the cry for more nationalization. The National Equal Rights League urged the United States to intervene and protect the Scottsboro lads with federal troops to “avert a racial massacre.”<sup>216</sup>

While the Justice Department never adopted measures as extreme as some Americans demanded, the more sensationalistic recommendations for the war on crime obscured the administration’s radicalism. In August 1933, Roosevelt told James Moss of the U.S. Flag Association that he was “deeply interested in and heartily endorse[d] the crusade against crime” undertaken by the Association, calling it a “patriotic undertaking” worthy of “the support of all loyal citizens.”<sup>217</sup> The attorney general spoke more openly and explicitly that month in addressing the Daughters of the American Revolution. “We are now engaged in a war,” said Cummings, “a war with the organized forces of crime.”<sup>218</sup> It was a “real war,” an “open challenge to our civilization.”<sup>219</sup> Even more chilling rhetoric came from Joseph B. Keenan, Assistant Attorney General in charge of Racketeering, in a Chicago speech, excerpted by the *New York Times* under the title, “Federal War on Crime.” Keenan related crime control vigilance to the New Deal as a whole: “Just as the present administration under the inspired leadership of our great President has courageously faced the serious economic and social problems, it will move in every lawful manner to exterminate that group of people who seem decided that they can prey on the helpless public and earn their livelihood, even to the point of luxurious existence, through these methods.”<sup>220</sup> Both the war on crime’s militancy and its place within the New Deal became common themes. The U.S. Flag Association touted Cummings’s program as “the first scientific, concrete and practical plan.”<sup>221</sup> Although discouraging the Association’s use of letterhead suggesting presidential endorsement, the Roosevelt administration approved of this fusion of holistic progressivism and Hobbesean crackdown.<sup>222</sup> What began as a popular program to eradicate organized criminals subtly developed into a more ambitious social agenda.

Cummings embodied both the repressive and welfarist elements. This dualistic philosophy extended to his work in expanding the federal penitentiary system and the creation of the first federal civilian maximum-security prison.<sup>223</sup> Five months into his time as Attorney General, Cummings wrote to Keenan on the need for a “special prison for racketeers, kidnapers, and others guilty of predatory crimes.” He envisaged this new facility “in a remote place— on an island, or in Alaska, so that the persons incarcerated would not be in constant communication with friends outside.”<sup>224</sup> A week later Director of the Bureau of Prisons Sanford Bates wrote to Cummings, having favored relocating “perhaps one hundred of the most desperate men in each Atlanta and Leavenworth” to deter embarrassing public protests,” and suggesting that the suitable approach to Cummings’s desire for dealing with “desperate or irredeemable types of

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<sup>216</sup> Memorandum for the Attorney General, 21 November 1933, OF10 Box 1, Folder: DOJ, Sept–Dec 1933.

<sup>217</sup> Letter to James A. Moss of the United States Flag Association on their Crusade Against Crime, 14 August 1933, APPUCSB.

<sup>218</sup> Quotation in Tim Weiner, *Enemies: A History of the FBI* (New York: Random House, 2012), 69.

<sup>219</sup> Homer S. Cummings, “Predatory Crime,” National Broadcasting Company, 11 September 1933.

<sup>220</sup> Joseph B. Keenan, “Federal War on Crime,” *New York Times*, Aug 6, 1933, E4.

<sup>221</sup> Moss, US Army retired, to Howe, 29 December 1933, OF117, Folder: Crime 1934.

<sup>222</sup> Stanley, Hon. William, 9 August 1934, OF10 Box 2, Folder: DOJ, July–Oct 1934.

<sup>223</sup> For a Foucauldian analysis of maximum security prisons, politics, and power see Charles Bright, *The Powers That Punish: Prison and Politics in the Era of the ‘Big House,’ 1920–1955* (Ann Arbor: University of Michigan Press, 1996).

<sup>224</sup> Office memorandum to Keenan, August 1, 1933, in Carl Brent Swisher, Editor, *Selected Papers of Homer Cummings, Attorney General of the United States, 1933–1939* (New York: Charles Scribner’s Sons, 1939), 29.

individuals” would be Alcatraz.<sup>225</sup> Cummings arranged with Secretary of War George H. Dern a “revocable five-year permit” to use “Alcatraz Island and the War Department installations.”<sup>226</sup> *The Washington Post* hailed the development. “The welfare of society demands that criminals of this type be confined in quarters from which there can be no escape,” the paper editorialized, noting that the inmates could no longer “contaminate prisoners serving sentences for minor offenses.”<sup>227</sup>

An appreciation for repression bonded Cummings to J. Edgar Hoover. On catching Harvey Bailey, of the Kansas City Gang, Hoover graciously thanked Cummings for his gratitude. Working for Cummings was “an inspiration” and Hoover confidently affirmed “that the entire personnel of the Division of Investigation will bend every effort to carry out its duties in a matter that will be a credit to your administration.” Hoover’s intimate loyalty meant he could conceive of “no demand which you can make upon me, officially or personally, with which I will ever fail to comply.”<sup>228</sup>

At the same time, Cummings, unlike J. Edgar Hoover, was an ardent and unmistakable New Dealer. Some even regarded him as occupying its left flank. Indeed, Cummings’s appointment faced some resistance within the administration among those who saw his progressivism as dangerous. According to Cummings, Chief Justice Charles E. Hughes feared he would “shake the foundations of the industrial world.” Hughes had approved an aluminum company deal that Cummings had opposed on antitrust grounds.<sup>229</sup> Frank Murphy praised Cummings’s speech “Education, Science, and the New Deal,” who hoped for a “well organized” campaign of “those close to the President to preach the gospel of the New Deal.”<sup>230</sup> All in all, Cummings’s political philosophy closely resembled the pragmatic liberalism of Roosevelt. Cummings recognized that his legislative agenda followed the trends of modern governance, where government regulation needed to advance with the times to protect the public interest. But he did not believe that subjecting “the individual” to more “regulation and supervision than in the past” necessarily marked a “shift in our fundamental political philosophy.” The attorney general recognized the “essential freedom for the individual” as sacred as ever, only insisting that the greater “complexity of our civilization” required greater regulation of “the individual. . . for the public good.”<sup>231</sup> This pragmatism aided Cummings in building the war on crime coalition, and in guiding the administration’s escalation of criminal justice powers while avoiding the political extremes.

The emphasis on anti-corruption also brought together the New Deal vision and the criminal justice agenda. Cummings’s Justice Department spent the administration’s first four months investigating electoral corruption in Pittsburg, culminating in indictments and local press praise of the “Federal police forces.”<sup>232</sup> Joseph Keenan undertook an investigation of racketeering in New York City and looked into the possibility of “the maximum use of the Federal

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<sup>225</sup> Memorandum from Bates, August 8, 1933, in Swisher, *Selected Papers of Homer Cummings*, 30.

<sup>226</sup> Letter to Dern, October 14, 1933, in Swisher, *Selected Papers of Homer Cummings*, 30.

<sup>227</sup> “An Island Prison,” *The Washington Post*, October 15, 1933, 6.

<sup>228</sup> Hoover to Cummings, 16 August 1933, PHSC Box 114, Folder: J. Edgar Hoover.

<sup>229</sup> Cummings to EM House, 8 Feb 1933, PHSC Box 114, Folder: misc., House.

<sup>230</sup> Murphy to Cummings, 2 April 1934, PHSC Box 135.

<sup>231</sup> Homer Cummings, “Our Widening Life,” Oglethorpe University, Georgia, 27 May 1934.

<sup>232</sup> Cummings to Mr. President, 21 July 1933; New Deal’s Results, 18 July 1933, *Pittsburgh Press*, OF10 Box 1, Folder: June–August 1933.

authorities.”<sup>233</sup> After an appeal of an expensive trial in a Prohibition graft case in Delaware County, Pennsylvania, spared all seventy-one defendants from punishment, Cummings still applauded the disruption of “one of the most corrupt political machines” and the “large sums in income taxes” gathered.<sup>234</sup> The New Dealers were anti-prohibition, but also anti-corruption, which they targeted as the “unholy alliance between venal politicians and organized bands of racketeers.”<sup>235</sup> The focus on politicians also promised an extension of the meaning of criminality to include previously protected classes.

The attorney general’s commitment to New Deal governance and an active Justice Department situated him well in an administration constantly experimenting with the boundaries of constitutional permissibility. He believed that law was “not a mere body of precedents” but a “living, vital, growing theme.”<sup>236</sup> Cummings was consulted on appointees for the judiciary throughout the 1930s.<sup>237</sup> In advising Roosevelt on Justice Department and judiciary appointees, the attorney general considered candidates in terms of both partisan political positions and the ongoing development of American legal thought. He invoked the name of great legal thinker Roscoe Pound if he recommended a particular candidate.<sup>238</sup> He would also take note of a prospect’s activism in the Democratic National Committee. Cummings cared about ideology as well as a “well written and progressive opinion.”<sup>239</sup>

Cummings’s legalistic approach to social and crime policy spoke to the blurring of lines between these policy initiatives—as well as to the increasing reliance of the rising New Deal state on criminal justice power. His involvement in regulatory enforcement exposed him to a regime that often treated regulatory violators as criminals.<sup>240</sup> Just as criminal justice fell within the broad definition of the New Deal, the most explicit targets of New Deal governance—corporate malfeasance and regulatory violation—became subject to a new punitive approach dependent on criminal penalties. Highlighting the fuzzy line between regulation and criminal justice, the National Recovery Administration’s and Justice Department’s lawyers worked together, often using the 1907 Criminal Appeals Act to allow direct appeal to a Supreme Court order when a District Court stayed an indictment on grounds of a statute’s unconstitutionality.<sup>241</sup> The National Recovery Administration’s Blue Eagle became for Roosevelt advisor Louis Howe a symbol of justice around which the public could rally into an “organized movement,” a citizenry that would form “Juries [that would] convict rather than face public scorn of chicken-heartedness of their part.”<sup>242</sup> Advocates of criminalization and of regulation could thus find common ground and mutual benefit in each other’s agendas.

Meanwhile, the attorney general constantly contemplated constitutional and legal limits. In his public addresses on crime he stressed the need for the federal and state governments to

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<sup>233</sup> Joseph B Keenan to Louis McHenry Howe, 1 August 1933, OF 10 Box 1, Folder: DOJ June–August 1933.

<sup>234</sup> Cummings to President, 7 November 1934, OF 10 Box 2, Folder: DOJ Nov–Dec 1934.

<sup>235</sup> “A Twelve Point Program” Address Delivered before Continental Congress of the Daughters of the American Revolution, 19 April 1934, PHSC Box 213.

<sup>236</sup> Speech by Cummings, Dinner Given at Stratfield Hotel, Bridgeport Connecticut, 15 April 1933, OF DOJ 1, Box 1: March–May 1933.

<sup>237</sup> Cummings to President, 4 May 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>238</sup> Cummings to Mr President, 29 May 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>239</sup> Attorney General to President, 10 March 1934, OF10 Box 2, Folder: DOJ Jan–Apr 1934.

<sup>240</sup> Attorney General, 28 July 1933, OF 10 Box 1, Folder: DOJ, June–August 1933.

<sup>241</sup> Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982).

<sup>242</sup> Quotation in Potter, *War on Crime*, 122.

extend into the jurisdictional “Twilight Zone” that had gone ungoverned.<sup>243</sup> A virtually everyday function of his official job was to ponder the boundaries of federal power, which in an activist government made him exceedingly important to the whole of domestic policy. As Roosevelt’s Attorney General, Cummings soon became the heart and soul of New Deal legal thought. His role as principal legal arbiter for the New Deal state made Cummings accustomed to pushing the limits of power and elevated his office’s prestige, both of which uniquely equipped him to fashion a distinctly New Deal war on crime, one that accommodated officials across institutions usually jealous of one another’s authority.

Cummings constantly chimed in on the legality of New Deal measures. He gave an opinion on legislation for food and drug regulation.<sup>244</sup> The administration consulted on the meaning of executive orders and statutes, such as whether an Executive Order had abolished the Public Buildings Commission.<sup>245</sup> Significant questions for law and order included the matter of jurisdiction, particularly courts in the Canal Zone, the Virgin Islands, and China, which Cummings worked to transfer under the Justice Department.<sup>246</sup> Whether courts qualified as an “executive agency” for purposes of reorganization legislation remained another question.<sup>247</sup> Cummings routinely asked to publish these opinions.<sup>248</sup> He of course also contemplated the specific legal significance of the repeal of the Eighteenth Amendment.<sup>249</sup> The same legal mind thus navigated the frontiers of the legal authority pushed by both the New Deal and war on crime.

The attorney general did not rubberstamp everything—he argued against the legality of certain aspects of the Federal Alcohol Control Administration executive order.<sup>250</sup> He did not want the code authority power of the National Industrial Recovery Act in the direct hands of General Hugh Johnson.<sup>251</sup> Even these moments of restraint, however, often affirmed presidential authority. Cummings generally favored expansive executive power, arguing that some of his gold confiscation authority had emerged from the “broader powers vested in the President himself.”<sup>252</sup> He tended toward a broad reading of statutes, arguing that the National Industrial Recovery Act gave the president authority to create the Commodity Credit Corporation.<sup>253</sup> He read the Federal Emergency Relief Act to give Roosevelt very broad authorization.<sup>254</sup> Cummings usually read statutes liberally, finding extensive statutory power for executive agencies like the

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<sup>243</sup> Homer Cummings, “The Campaign Against Crime,” Columbia Broadcasting Company, 22 November 1933, HCDOJ; Cummings, “Progress Toward a Modern Administration of Criminal Justice in the United States” before the North Carolina Conference for Social Welfare, 27 April 1936, in Swisher, *Selected Papers of Homer Cummings*, 45–8.

<sup>244</sup> Memorandum for Assistant Sec. Tugwell, 20 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>245</sup> Attorney General, 7 September 1933, OF10 Box 1, Folder: DOJA Sept–Dec 1933.

<sup>246</sup> Attorney General Cummings, 4 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>247</sup> Acting Attorney General to President, 26 October 1933, OF10 Box 1, Folder: DOJ Sep–Dec 1933.

<sup>248</sup> Memo from the Attorney General, OF 10 Box 2, Folder: DOJ July–Oct 1934.

<sup>249</sup> Attorney General, 11 September 1933, OF10 Box 1, Folder: DOJA, Sept–Dec 1933.

<sup>250</sup> Director of the Budget, Attorney General, State, Secretary, 28 May 1934, OF 10 Box 2, Folder: DOJ May–June 1934.

<sup>251</sup> Labor, Sec of, 18 June 1934, OF10 Box 2, Folder: DOJA May–June 1934.

<sup>252</sup> Cummings to President, 17 November 1933, OF10 Box 1, Folder: DOJ, Sep–Dec 1933.

<sup>253</sup> Secretary of Agriculture, 17 October 1933, OF10 Box 1, Folder: DOJ, Sep–Dec 1933.

<sup>254</sup> Federal Emergency Relief Administrator Hopkins, 11 November 1933, OF10 Box 1, Folder: DOJA Sept–Dec 1933.

Agriculture Department.<sup>255</sup> Eventually the president issued an order authorizing agencies to consult Cummings directly on questions of jurisdiction.<sup>256</sup> He became a key authority on how to legally appropriate money.<sup>257</sup> The attorney general's input took on great policy significance.

Homer Cummings's integrated vision of governance smoothed relations across institutions, but this concealed a continuing volatility. On gold hoarding, he urged Roosevelt to wait until the Treasury had time to distribute regulations to the Federal Reserve member banks.<sup>258</sup> The Treasury raised questions about the long-term problems of institutional uncertainty. Reorganization meant Cummings wanted to transfer Internal Revenue's general counsel to the Department of Justice's Tax Division.<sup>259</sup> Winding down alcohol prohibition threatened to leave the Treasury's enforcement powers in a state of uncertainty. Cummings worried that the end of alcohol Prohibition would invite racketeers, and wondered how to deal with them.<sup>260</sup> Roosevelt's attorney general mitigated the tensions among agencies, but maintaining the peace would persist as an administration priority.

On December 4, 1933, America was wet again. With the crisis of Prohibition ended, Cummings had great leeway to determine the future of the war on crime in this uncertain moment marked by institutional and ideological volatility. Having spent ten months finding their bearings, the New Dealers, led by Roosevelt and Cummings, had adopted a novel approach to resolving the short-term crises and put the country on track for long-term reform. They had situated themselves for a New Deal war on crime true to both components, a program that could accommodate those with previously antagonistic politics and institutional loyalties. In the next year the triumph of the war on crime coalition would become undeniable.

### 1934: The Coalition Has Arrived

Nineteen-thirty-four was a big year for the war on crime. Perhaps *the* big year. Whereas at first, they had to contend with the baggage of their predecessors, Roosevelt and Cummings could now shape the terms of debate. Prohibition was over. Kicking off the year in his annual message to the new Congress on January 3, Roosevelt noted that legalizing alcohol served to aid the efforts against crime, and he lashed out against "banditry, coldblooded shooting, lynching and kidnapping," crimes that he said warranted "the strong arm of the Government for their immediate suppression."<sup>261</sup> He predicted that ending Prohibition "should give material aid to the elimination of those new forms of crime which came from the illegal traffic in liquor."<sup>262</sup> The repeal of the eighteenth amendment was thus a strategic war on crime maneuver.

Cummings began the new year with a proud assessment of 1933 and a reminder that ending Prohibition would not mean de-escalation in the war on crime. In a National Radio Forum

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<sup>255</sup> Opinion of the AGOTUS, 13 April 1934, OF10 Box 2, Folder: DOJ Jan–Apr 1934.

<sup>256</sup> Exec Order authorizing agencies of the United States to Refer Questions of Jurisdiction to the Attorney General for Determination, OF10 Box 2, Folder: DOJ Jan–Apr 1934.

<sup>257</sup> Referred to the Attorney General, 15 November 1934, OF 10 Box 2, Folder: DOJA Nov–Dec 1934.

<sup>258</sup> Attorney General, 23 August 1933, OF10 Box 1, Folder: DOJ June–August 1933.

<sup>259</sup> Cummings to President, 9 October 1933 OF10 Box 1, Folder: DOJ Sep–Dec 1933.

<sup>260</sup> Broadcast over the Network of the National Broadcasting Company, National Radio Forum Arranged by Washington Star, 24 April 1933, OF10 Box 1, Folder: DOJ March–May 1933.

<sup>261</sup> Annual Message to Congress, January 3, 1934, APPUCSB.

<sup>262</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 1, P. 7 (10–11).

address on January 10, 1934, Cummings noted that “In numbers of opinions rendered, new legislation and executive orders reviewed, and in many other phases of civil activity, including gold hoarding, National Recovery Administration matters, tax cases, land condemnations, customs matters, and the vast realm of government litigation, this Department has been called upon in the last ten months to undertake a hitherto unparalleled volume of work.” Implicating the dual nature of alcohol control as both a punitive and regulatory matter, Cummings intoned that even with repeal of the Volstead Act, “it still remains the duty of the government to protect the dry states from the illegal importation of liquor.”<sup>263</sup> Regulating liquor, along with managing the problems unleashed by Prohibition, counted among the new tasks of the post-Volstead war on crime.

The attorney general took advantage of the opportune moment to pursue a sweeping legislative program. Congress began the year ready to do something significant about crime. Some worried that the end of Prohibition would unleash a sort of anarchy on American society. Congressman Francis Shoemaker stressed the “morale” that Americans had “before prohibition,” and urged the return to a “civilized state.”<sup>264</sup> Proposals for reform often strained imaginations of plausibility. Senator Royal Copeland thought that after every single conviction a thorough psychological and medical examination of the convict should come before sentencing.<sup>265</sup> Such fanciful proposals only revealed how broadly the boundaries of debate had advanced.

In April, Cummings introduced his “Twelve Point Program” to the Daughters of the American Revolution. It captured both the old and new. The “suppression of crime has become a national program of the first magnitude,” costing billions a year. Corruption facilitated the lawlessness, thanks to an “unholy alliance between venal politicians and organized bands of racketeers.” Crooked lawyers also delayed justice. Taken together, the problem paralleled foreign threats to national security. “Where one hundred years ago the chief concern was the common defense against foreign aggression and savages,” Cummings explained, “today it is rather a common defense against organized, anti-social activities extending beyond state lines. . . plunder and profit.” Cummings lamented America’s jurisdictional uncertainty. He hoped to encourage relations among states, restrict firearms, more harshly pursue crimes against federal officials, and take numerous steps to streamline criminal procedure.<sup>266</sup>

Cummings’s bills in the spring and summer of 1934 represented one of the most radical expansions of national power in American history, made all the starker by the relative lack of debate or disagreement (see Figure 2.1). This most significant aggrandizement of the federal criminal code found cover in the fact that many American voices advocated something even more radical. As Congressman Ruffin put it, amidst the “strong clamor for the Federal Government to step forward and take a more active part in fighting crime” were “suggestions” to go “so far as to advise that martial law be declared and military action taken to rid our country of

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<sup>263</sup> National Radio Forum, January 10, 1934, Swisher, *Selected Papers of Homer Cummings*, 11–12.

<sup>264</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 1, 120.

<sup>265</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 1, 450.

<sup>266</sup> “A Twelve Point Program,” Address Delivered before Congress of the Daughters of the American Revolution, 19 April 1934, PHSC Box 213.

crime.” Those proposing that Washington “take over the entire police power from the States” demanded an unacceptable revolution, Ruffin argued, but something serious had to be done.<sup>267</sup>

Cummings’s legislative agenda found a friendly reception in Congress, and dependable allies in Senator Royal Copeland, who crafted legislative proposals, and Henry Ashurst. Much of the legislation passed by voice vote. Sometimes the Senate would advance the legislation lumped together, easing passage. At one point the web of legislation was simply called “sundry bills prepared by the Department of Justice known as the ‘antigangster bills.’” On May 3, Senators called up several bills for vote without objection.<sup>268</sup> Congressman Glover predicted that “the entire program of the Attorney General will be enacted into law.” Glover saw the urgency for such legislation, suited for the specific conditions of the 1930s, as never before had “such an organized body of men” undertaken “grave crimes” as had appeared in the “last 2 or 3 years.”<sup>269</sup> In early May after some back and forth between the House and Senate, a bicameral conference found compromise on half a dozen acts, sent to the president for his signature.<sup>270</sup>

Some of the legislative agenda qualified as low-hanging fruit, predictably popular in any war on crime. Two bills established federal law to protect U.S. federal officers against acts of violence and cracked down on prisoners disrupting or rioting in penal and correctional institutions, a problem that had become a national scandal in the late 1920s and early 1930s.<sup>271</sup> In Senate Bill 2917, Ashurst pushed for Congressional recognition of interstate compacts devised to coordinate against crime.<sup>272</sup> Several of the proposals sought to streamline criminal procedure. Senate bill 2460 would rein in the statute of limitations in the case of a second trial.<sup>273</sup> Ever since a change in the law in 1878, defendants could take the stand in their own defense—but if they refused to, prosecutors could not legally comment on that fact. Cummings wanted to change that. Some abortive attempts to weaken habeas corpus and weaken alibi defenses nevertheless revealed the breadth of the war on crime coalition.<sup>274</sup> One proposal, S 2461, allowed the Supreme Court to have rule making authority in proceedings of criminal cases with a guilty verdict.<sup>275</sup> Easing restrictions on spousal testimony also enjoyed popularity, a radical shift in the jurisdictional subsidiarity government had respected in the past.<sup>276</sup>

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<sup>267</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, 6854.

<sup>268</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 8, May 3, 8043.

<sup>269</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 8, May 5, 8148.

<sup>270</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 8, May 11, 8653.

<sup>271</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 6, March 29, 5737–5738.

<sup>272</sup> S 3371. See Joseph B Keenan, “Bills Drafted by Department of Justice in Aid of Law Enforcement,” *ABA Journal* 20, No. 4 (April 1934), 306.

<sup>273</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 8, May 5, 8129.

<sup>274</sup> 2254: “A bill abolishing the right of appeal in certain habeas corpus proceedings.”; 2843 A bill (8. 2843) to regulate the defense of alibi in criminal

<sup>275</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 4, 3732.

<sup>276</sup> S. 2842. See also Raymond Moley, “To the President, First of Three Sections of a Report. . .,” 15 May 1934, OF10 Box 2: DOJ May–June 1934. For more on criminal procedure see “The War on Crime Constitution,” chapter 6 of this dissertation.

In relying on interstate commerce for its constitutional validation, Cummings's legislative agenda sometimes built on the continuity of past precedents and other times broke new ground. Some laws built on the logic of previous attempts to expand on interstate commerce. One bill expanded the Lindbergh Act and another extended the national Motor Vehicle Theft Act to other forms of property.<sup>277</sup> One bill, S822, amended legislation from 1909 and 1929 to forbid the mailing of drugs.<sup>278</sup> Some of the legislation, on the other hand, was more particular to the New Deal order. Banking regulation became the rationale for nationalizing the law against bank robbery. S2841 provided punishment for certain offenses committed against banks, organized or operating under laws of the United States, or any member of the Federal Reserve System.<sup>279</sup> Cummings called S2248 "a proposed Federal antiracketeering statute based on the interstate commerce power," which sought to build on the Sherman Act, removing the necessity of conspiracy, to target any criminal behavior that found "any degree [to be] affecting, burdening, hindering, destroying, stifling, or diverting trade or commerce or any article or commodity moving or about to move in trade or commerce."<sup>280</sup> Another bill, S2249, relied on an expansive reading of interstate commerce to federally criminalize extortion by "telephone, telegraph, radio, or oral message."<sup>281</sup> The reliance on interstate commerce jibed with New Deal liberalism, but both S 2248 and S 2249 strained relations with organized labor. Representatives from the American Federation of Labor complained that they had been left out of the loop, and worried that both would discriminate against workers.<sup>282</sup>

In signing a slate of legislation in May, Roosevelt stood with the core of the war on crime coalition. A war on crime posse—Cummings, Hoover, Ashurst, and Keenan—surrounded the chief executive. Urged by Cummings, Roosevelt gave a statement.<sup>283</sup> The president highlighted the necessity to empower the federal government to engage interstate law breaking and spoke to his "broader program designed to curb the evil-doer of whatever class." In this escalating crusade against crime Roosevelt pledged "no relenting" and called upon the public to help the national undertaking of "[l]aw enforcement and gangster extermination." Paying deference to Hoover's struggle with America's romance with gangsters, Roosevelt condemned "efforts to romanticize crime."<sup>284</sup> This emphasis on shifting the culture away from lawlessness and toward deference to the central state unified the social reformers and conservatives who constituted the coalition.

And that was just in May. Even more novel legislative ruptures occurred the next month. These laws established new precedents for federal law enforcement, literally tipping the balance of firepower toward the federal government. Cummings strongly supported expanding and

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<sup>277</sup> S 2252: "A bill amending the Lindbergh Act," Cummings to Ashurst letter, Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 5, 22 March, 5082. It passed the House on May 5. See *Ibid.*, Volume 78, Part 8, 8127. The bill CS. 2845, to extend the provisions of the National Motor Vehicle Theft Act, Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 5, March 22, 6082; passed the House on April 20, Part 7, 6981.

<sup>278</sup> S822:1929 act that amended 1909 act on mails and drugs passed April 25 in the Senate, Pt 7. 725.

<sup>279</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 6. March 29, 5738.

<sup>280</sup> Cummings letter to Ashurst, 15 March 1934, in Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 5, March 22, 5082; also see March 29, 5735.

<sup>281</sup> *Ibid.*, March 22, Pt. 5, 5082.

<sup>282</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 6, April 2, 5859.

<sup>283</sup> Memorandum for the President from Stephen Early, 17 May 1934, OF10 Box 2: Folder, DOJ May–June 1934.

<sup>284</sup> Statement on Signing Crime Bill, 18 May 1934, APPUCSB.



empowering the Division of Investigation. He wished to boost the Division of Investigation budget to \$700,000 but submitted to compromise.<sup>285</sup> J. Edgar Hoover's agency was relatively small and powerless before June legislation that empowered him, his "Assistant Directors, agents, and inspectors" to "serve warrants and subpoenas" and "to carry firearms."<sup>286</sup> Another proposal sought to expand the Division with new personnel, recommended by the states' governors. Senator Copeland criticized the current makeup of the Bureau for the heavy presence of attorneys. One could not expect that "20 lawyers. . . from Chicago" could deploy "into the woods of northern Wisconsin" to hunt down John Dillinger. Such an expectation would be "an absurdity." Although Cummings wanted the Division to have "a thousand men," Copeland considered at least a hundred a good start.<sup>287</sup>

The legislation not only significantly empowered the Division of Investigation but clarified its role after many years of uncertainty. The Justice Department had virtually no enforcement and investigatory power at all until the twentieth century, and ever since the Division began in 1908 it had been weak and controversial, its future precarious. J. Edgar Hoover's outfit now had its stamp of permanence. The legislation Cummings pushed in May unambiguously began the process of bringing Hoover's agency into the New Deal agenda and American liberalism into the security state.<sup>288</sup>

The same month Congress ratified Cummings's bold plan to arm the Division of Investigation, it passed a comparably groundbreaking law to disarm criminals. Whereas a constitutional amendment had authorized Congress to ban liquor, the first national firearms law claimed its authority in the federal power of taxation, modeled after the Harrison Narcotics Act of 1914.<sup>289</sup> Legislators introduced new firearms legislation starting in 1933, and the connection between gun regulation and the New Deal became explicit in Roosevelt's personal involvement in October of that year to ensure that National Recovery Act codes restricted manufacturers in their machine gun sales.<sup>290</sup>

Cummings considered firearms control an important fixture of his program. He was not alone. The crusade against easy access to firearms often adopted the New Deal rhetoric against the profit motive. W.G. Shephard condemned an industry that would provide "machine-guns and revolvers. . . to any one who can afford them," hoping the United States would "put [its] thumb on [its] gullet. . . until that industry ceases to breathe."<sup>291</sup> Speaking to the Continental Congress of the Daughters of the American Revolution on April 19, 1934, the anniversary of Lexington and Concord, Cummings stressed that firearms stood central in the efforts against crime, which had become a "national problem of the first magnitude." He gave a "conservative" estimate that "there are more people in the underworld carrying deadly weapons than there are in the Army

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<sup>285</sup> D.W. Bell, Acting Director, Memorandum for the President, 19 November 1934, OF10 Box 2, Folder: DOJ Nov-Dec 1934.

<sup>286</sup> It passed the House on June 8. See Congressional Record, Proceedings and Debates, Pt. 10, 10865.

<sup>287</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 10, June 6, 10590,

<sup>288</sup> The empowerment of the FBI is one of the few New Deal criminal justice matters historians have studied. See O'Reilly, "A New Deal for the FBI."

<sup>289</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 7, April 18, 685.

<sup>290</sup> Carol Skalnik Leff and Mark H. Leff, "The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-38," *Annals of the American Academy of Political and Social Science*, Vol. 455, Gun Control (May, 1981), 53-4.

<sup>291</sup> W.G. Shepherd to Louis Hall, 2 June 1933, OF117 Crime 1933.

and Navy of the United States.”<sup>292</sup> Senator Copeland argued for licensing manufacturers, retailers, fingerprinting gunowners, tagging guns with serial numbers, and forbidding the purchase of ammunition designated for firearms the buyer did not have a legal right to own.<sup>293</sup>

The plan under HR 9741 was to register firearms and tax targeted ones out of regular use. Original drafts of the legislation, unlike most of the the war on crime agenda, ran into significant resistance. Sports and hunting organizations worried that their pastimes would become prohibitively expensive. Others expressed worry that including handguns would jeopardize Americans’ right to self-defense within their own homes. Robert Doughton, chairman of the House Ways and Means Committee, took this latter concern seriously, and removed pistols and revolvers from the legislation. Most on the Committee thought that an American’s use of a handgun for “protection of himself and his family should not be classed with criminals, racketeers, and gangsters” and that law-abiding handgun owners should not be “compelled to register his firearms and have his fingerprints taken.”<sup>294</sup> Sporting groups withdrew their opposition, but progressive activists and women’s groups protested the weakening of legislation. Others feared that the law would interfere with the right of states to impose additional controls and taxes, but these concerns quickly abated. Taking handguns out of the legislation made it much less controversial, and indeed a Senator interrupted a floor speech to move to pass the House version of the legislation, promising the speech could continue once the law passed. The Senate ratified the National Firearms Act on June 18.<sup>295</sup>

Despite falling short of Cummings’s vision, the prohibition of certain classes of firearms proved one of the most significant shifts in national law.<sup>296</sup> Not only did it mark the first federal firearms prohibition; its wide acceptance by conservative and liberal stalwarts in the war on crime signalled an impressive moment of consensus. The war on crime coalition had found agreement over a policy area that for much of American history, before and after, invited sharper disagreement.<sup>297</sup> By pursuing a compromise reform, moderate by their standards but radical in the historical sweep, the New Deal’s congressional supporters maintained the integrity of the war on crime coalition.

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<sup>292</sup> “A Twelve Point Program” in Swisher, *Selected Papers of Homer Cummings* 24, 25–6.

<sup>293</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 1, January 11, 455.

<sup>294</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 11, 11677.

<sup>295</sup> Doughton supported HR 9741. See Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, Part 9, May 23, 9427; 9554; HR 9741 is in Part 11, June 13, 11400; S 3795, June 14, Pt 11, 11470; June 18, 12399; June 15, 11677.

<sup>296</sup> Carl Bakal focuses on the missed opportunity rather than the extent of the accomplishment in *The Right to Bear Arms* (New York: McGraw–Hill Book Company, 1966), 166–77.

<sup>297</sup> Looking back, scholars see its insignificance in light of how much it was watered down, but it the National Firearms Act of 1934 was the first major modern national gun control legislation, accompanied by a customized constitutional theory. The federal government had never before been recognized as having plenary authority in this area of lawmaking, and after the Civil War its major expansion of criminal justice authority over firearms policy was in part to secure the right to bear arms against state-level Black Codes.

<u>Congressional bill</u>	<u>Effect</u>
S 2252	Death penalty for injured victims of kidnapping, Presumption of interstate crime after one week of kidnapping
S 2253	Prohibits interstate fleeing to avoid prosecution, Prohibits interstate fleeing to avoid testifying
S 2845	Extends Motor Vehicle Act to punish interstate transportation and receipt of stolen goods worth over \$5,000
S 2841	Death penalty for bank robberies resulting in deaths, when banks are members of Federal Reserve system or insured by FDIC
S 2844	Registration of machine-guns and sawed-off shotguns and rifles
S 2040	Federal offense to assault or kill federal agents
HR 9476	Department of Justice agents may carry weapons
S 2248	Trade and commerce protected against intimidation and racketeering
S 2460	Streamlining criminal procedure (statute of limitations)
S 2917	Facilitates interstate compacts

*Figure 2.1* Key Legislation Passed by the 73rd Congress, 1934

Source: Congressional Record, as detailed in footnotes.

In addition to passing a slate of far-reaching legislation, the war on crime coalition managed by the end of 1934 to bridge institutional divides. The institutional volatility surrounding the war on crime became apparent in early August 1933, when Roosevelt transferred Assistant Secretary of State Raymond F. Moley to conduct a crime survey for the Justice Department, a transfer “from one department to special duties in another. . . believed to be without precedent.”<sup>298</sup> In May 1934, Raymond Moley released his first section of a report on crime, a testament to the potential for cooperation across agencies. As he noted, the focus on organized crime necessarily extended to the “broad aspects of criminal law enforcement generally,” and not just at the federal level. Moley consulted a diverse group from Joseph Keenan and J. Edgar Hoover to Earl Warren and Colonel Henry Barret Chamberlain.<sup>299</sup>

Reconciling the needs of the Treasury and Justice Departments, historically in tension on issues of crime control, posed deeper challenges. With Roosevelt’s victory, the Treasury Department faced reorganization and personnel challenges. Through taxes and regulation, the Treasury continued to target bootlegging, and prosecutions of smuggling and alcohol violations persisted.<sup>300</sup> Harry Anslinger, the Republican head of the Narcotics Bureau, provoked controversy much as J. Edgar Hoover did. Democrats urged the replacement of Anslinger, a holdover from the Hoover administration and related by marriage to the Andrew Mellon family,

<sup>298</sup> “Moley Detached for Crime Survey,” *New York Times*, 3 August 1933.

<sup>299</sup> Raymond Moley, “To the President, First of Three Sections of a Report,” 15 May 1934, OF10 Box 2, Folder: DOJ May–June 1934.

<sup>300</sup> Wildman to Henry Morgenthau, 30 August 1934, OF21 Box 20, Folder: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

widely detested by Democrats.<sup>301</sup> Despite these controversies, Roosevelt retained him on multiple occasions, a bipartisan reconciliation which served to ameliorate the divide between the two departments.

With Cummings's expansive goals, the future of the post-Prohibition carried wide implications. Cummings and Treasury Secretary Henry Morgenthau ably cooperated through a volatile time for both agencies. On March 10, 1934, the President signed an order worked out by Justice and Treasury in an effort to consolidate Treasury's executive agencies involved in taxation enforcement. The order abolished the Bureau of Industrial Alcohol and Office of Commissioner of Industrial Alcohol and transferred their powers to the Commissioner of Internal Revenue. It also moved the Commission of Internal Revenue and undid a 1930 order that had transferred prohibition functions to the Department of Justice.<sup>302</sup> The Justice Department's expansive mission allowed Treasury to take on more functions without reducing the overall importance of Cummings's outfit.

It helped that the New Deal government provided so much for everyone to do. Whatever uneasiness existed, both the Treasury and Justice Departments had ample enforcement work on their plates. By September, the Treasury Department had a modernized, international role in criminal law. Every week several representatives of the Department's relevant divisions convened, forming the Committee on the Coordination of Treasury Activities for the Prevention of Smuggling. In these meetings, the Coast Guard, Alcohol Tax Unit, Customs, Narcotics Bureau, and Secret Service discussed the institutional needs of enforcing America's territorial integrity and updated each other. Thus did they have a significant outlet for collaboration outside the purview of the Justice Department.<sup>303</sup>

At these meetings the Treasury contemplated its busy future after Prohibition. Morgenthau's officials warned that more states would begin repealing their liquor laws, justifying more scrutiny into the "character" of those who receive liquor licenses.<sup>304</sup> Treasury also used the meetings to discuss the importance of cooperation with state officials, particularly near its divisions in Boston, New York, Norfolk, Jacksonville, New Orleans, San Francisco and Seattle.<sup>305</sup> International cooperation emerged as an important priority, particularly collaboration with the Canadian preventive Service.<sup>306</sup> Prohibition repeal reduced the problem of smuggling, but tax evasion and narcotics continued to present opportunities.<sup>307</sup> Looking at Anslinger as inspiration, the group also hoped to conduct simultaneous raids, keeping all orders off the written records.<sup>308</sup> Anslinger believed the current law sufficed to allow broad search powers, that it was all a matter of "interpretation."

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<sup>301</sup> Hon. A.J. Sbaath, 26 May 1934, OF21 Box 19; William McDonald to James A Farley, 25 April 1933, OF21 Box 19.

<sup>302</sup> Attorney General, 5 March 1934, OF10 Box 2: Folder: DOJ January–April 1934.

<sup>303</sup> Minutes of the Meeting for the Committee on the Coordination of Treasury Activities for the Prevention of Smuggling, Sept 11 1934, ROLEC Box 1.

<sup>304</sup> Memorandum for Secretary Morgenthau, 18 September 1934, ROLEC Box 1.

<sup>305</sup> Memorandum for the Secretary of the Treasury, 18 Sept 1934, Minutes of the Meeting for the Committee on the Coordination of Treasury Activities for the Prevention of Smuggling, 11 September 1934, ROLEC Box 1.

<sup>306</sup> Minutes of the Meeting. . . 9 October 1934, Committee on the Coordination of Treasury Activities for the Prevention of Smuggling, 11 September 1934, ROLEC Box 1.

<sup>307</sup> Minutes of the Meeting, 30 October 1934, ROLEC Box 1.

<sup>308</sup> Coast Guard Headquarters, 12 December 1934; 20 December 1934, ROLEC Box 1.



Figure 2.2 Dedication ceremony for U.S. Department of Justice building, October 25, 1934.

Source: U.S. Department of Justice, “The Robert F. Kennedy Building: Celebrating Art and Architecture on the 75<sup>th</sup> Anniversary, 1934–2009.”

While the Treasury Department enjoyed new law enforcement prestige, the Justice Department, even beyond the Division of Investigation, received its biggest makeover in 1934. New pardon applications were established in the spring.<sup>309</sup> In May, a new modernized official seal appeared.<sup>310</sup> Most important, the Department of Justice finally had its own permanent building. A dedication ceremony on October 25, 1934, celebrated the Department’s coming of age (see Figure 2.2). The Navy band’s live music, ranging from “In Ole Virginy” to “Stars and Stripes Forever,” well suited the interregional diversity of the New Deal Coalition.<sup>311</sup> The event’s organizers put out 2,917 seats for spectators to witness the dedication of the new \$10 million building. Cummings relayed a short history of his office and department, including its previous location within the Treasury Department. It was a long way from the days when Justice occupied several floors of the Freedmen’s bank. “During the greater part of its 145 years of existence,” noted the Attorney General, “the legal department of the United States has been a government wanderer with no local habitation of its own. . . for more than half that period, without an authoritative name.” The Department of Justice had previously been housed in the Treasury, half a mile away from the law library. Cummings described a pathetic lack of institutional memory, where each Attorney General would come on board with very little left behind to inform him in his new job. The new building stood “symbolic of twentieth century growth of the government’s legal machinery,” its comparison to the Department’s “past crude facilities” was akin to “comparing a modern automobile with an old horse-drawn wagon.” Its 20,900,000 cubic feet could house 12,000 people and accommodate an impressive law library.<sup>312</sup> Roosevelt sent a statement celebrating the Justice Department’s functions now falling “under one roof.”<sup>313</sup> Although President Herbert Hoover had laid the cornerstone in the last two weeks of his presidency, it was the New Deal that modernized the activities the new building would harbor.

<sup>309</sup> Exec. Assistant to Attorney General to Louis Howe, 21 April 1934, OF10 Box 2, Folder: DOJ Jan–Apr 1934.

<sup>310</sup> Howe to Mr. Attorney General, 2 May 1934, OF10 Box 2, Folder: DOJ May–June 1934. Director of Bureau of Budget to Sec of State, 26 April 1934, OF10 Box 2, Folder: DOJ May–June 1934.

<sup>311</sup> The Dedication of the Building for the Department of Justice, Washington DC, October 25<sup>th</sup> 1934 Program. President, Chief Justice, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>312</sup> May 10, 1934, Dedication of the New Building for the Department of Justice, PHSC Box 218; Albert W Fox, “Dedication of New Home of Department of Justice,” *American Bar Association Journal*, November 1934.

<sup>313</sup> Roosevelt to Attorney General, 10 May 1934, PHSC Box 218.

## Federal Bullets

Throughout 1934, Cummings and his allies managed to cooperate across party and institutional lines, and even the specter of extremism served to bring the coalition together. Early on, Roosevelt had J. Edgar Hoover keep tabs on America First and the Industrial Control Report.<sup>314</sup> Fringe calls for dramatic displays of federal intervention raised uncomfortable questions, but also strengthened the coalition between conservatives and liberals who agreed on eschewing the most extremist proposals. Hoover showed some concern about the rightwing “Crusader White Shirts” in Chattanooga.<sup>315</sup> Vigilante groups wanted to ally with the federal state as they had during World War I. Pushed together by the extremes, the war on crime coalition continued to pursue a new center in American law enforcement, a phenomenon that persisted not only through 1934 but served the New Deal government for the rest of the decade.

The question arose as to which side the administration should take in acts of disorder. This advanced the prospect that the war on crime would widen to target the forces of social reaction. Looking at the issue of federal troops, Attorney General Cummings sent a memo on past occurrences of their domestic use—in Arkansas and Colorado in 1914 and West Virginia in 1921.<sup>316</sup> The New Orleans mayor pled for use of federal intervention to protect property. Harold Stephens suggested against intervention on the basis that rioting was improbable.<sup>317</sup> Those demanding federal intervention included organized labor, and Roosevelt generally resisted its pleas. The unions’ attraction to federal police power, albeit unrequited, marked an important shift in labor’s attitude. Radicals saw their hope in New Deal talk of economic justice. F.J. Gorman, Chairman of the Strike Committee of the United Textile Workers of America, identified state militia being used against strikers in the South, and wondered if the federal government could intervene to protect labor.<sup>318</sup> Others hoped for intervention in a strike situation in Rhode Island, a prospect against which J. Edgar Hoover cautioned.<sup>319</sup> Although generally resistant to pleas to intervene, Cummings kept abreast of the labor strike in San Francisco.<sup>320</sup> The officials also weighed the politics, having received warning from a trusted lawyer that “radical agitators and Communistic leaders” had run the San Francisco Longshoremen’s Union, but also that Upton Sinclair’s extremism would deliver California to the Republicans. Cummings congratulated the Justice Department for not intervening on behalf of labor, and indeed argued that it would be “a serious mistake” not to “vigorously pursue all avowed Communists and deport those who are subject to deportation.”<sup>321</sup> California’s hostility expressed itself in its indictment of a Federal Emergency Relief Administration field representative, which Hopkins pressured Roosevelt and Cummings to quash.<sup>322</sup> The federal government’s refraining from intervening in these affairs altogether was likely the best labor or industry could realistically expect, but each side of the

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<sup>314</sup> Justice Department, 26 Sept 1934 (Oct 1 1934) OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>315</sup> Attorney General, 21 March 1934, OF10 Box 2, Folder: DOJ January–April 1934.

<sup>316</sup> Attorney General, 20 July 1934, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>317</sup> Stephens, Harold M., 6 August 1934, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>318</sup> Confidential Memorandum for the Attorney General, 11 September 1934, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>319</sup> Attorney General, 14 September 1934, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>320</sup> Cummings to President, 21 July 1934, OF10 Box 1, Folder: DOJ June–August 1933.

<sup>321</sup> John (lawyer) to Harold M Stephens, 19 July 1934, OF10 Box 2, DOJ July–Oct 1934.

<sup>322</sup> Memorandum for the Attorney General (FDR) 6 September 1934, OF 10 Box 2, Folder: DOJ July–Oct 1934.

class conflict held out hope that ultimately the war on crime coalition would side with them in economic disputes.

If labor became increasingly important part of the New Deal coalition, the Deep South, long skeptical of federal law enforcement power, also needed reassurance. The protest of lynching exposed the breach. After Roosevelt had included “lynching” in his January 3 address to Congress, condemning the threat it posed to American “security,” Congress members repeatedly proposed to ban lynching, but the ban never materialized.<sup>323</sup> The White House leveraged its influence to stop the anti-lynching legislation. Roosevelt’s advisor Louis Howe explained that including it would “create hostility to [the] other crime bills.”<sup>324</sup> Even as African-Americans hoped that Roosevelt might eventually crack down on lynching, Jim Crow Democrats had confidence that he would not.<sup>325</sup>

Regardless of the pragmatic brutality of Howe’s guidance, Roosevelt’s political strategies worked. Democratic victory in the Congressional election in November emboldened the administration in its agenda. A week before the elections, Cummings had stumped for the New Deal, defending its constitutionality and rejecting claims of American dictatorship, in Stamford, Connecticut, the town where he was mayor at the turn of the century. He defended the president’s program against the “reactionaries” who opposed it as their analogs had opposed every great march of progress from the Louisiana Purchase to the Federal Reserve. “The genius of the New Deal,” Cummings declared, resided in its “application of science” and “the doctrines of co-operation.” Calculation and planning had gone into the Agricultural Adjustment Act, the National Recovery Act, the Home Owners Loan Corporation, the Civilian Conservation Corps, the Civil Works Administration, and the Farm Credit Administration, as well as the “cleansing of the public service and a campaign against crime,” all “undertaken as matters essential to a healthy national life.”<sup>326</sup> A representative of the Tennessee and Mississippi Sheriffs and Peace Officers Association wrote to inform him that they passed a resolution endorsing “Cummings’ and Hoover’s war on crime.” Cummings declined to send agents to protect the polls, despite calls to do so, as he stood confident that his crime program had extensive appeal.<sup>327</sup> The Democrats gained nine seats in each house, a highly unusual midterm triumph for a sitting president’s party. For the first time since the ratification of the Eighteenth Amendment, the electoral politics around federal crime policy did not inconvenience the incumbents or frustrate the politics of the Democratic Party. The project of legitimation was working.

In the last month of 1934, Cummings’s National Crime Conference proved a testament to the coalition he had built. Roosevelt emerged as the indispensable attraction. Planning began in

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<sup>323</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States. Volume 78, Part 1, p. 7–23.

<sup>324</sup> O’Reilly, “The Roosevelt Administration and Black America: Federal Surveillance Policy and Civil Rights during the New Deal and World War II Years,” *Phylon* (1960–), Vol. 48, No. 1 (1<sup>st</sup> Qtr., 1987), 14.

<sup>325</sup> In *Racial Realignment: The Transformation of American Liberalism, 1932–1965* (Princeton: Princeton University Press, 2016), Eric Schickler sees labor as the key to understanding African Americans’ increasing receptivity to the New Deal and the shift in liberalism from its early New Deal blind spot to its embrace of civil rights. This approach does not fully grapple with the importance of the simultaneous presence of racial liberals and Jim Crow Democrats to the New Deal coalition.

<sup>326</sup> An address by Honorable Homer Cummings, Delivered at Stamford, Connecticut, 30 October 1934, HCDOJ.

<sup>327</sup> Tennessee and Mississippi Sheriffs and Peace Officers Association, 8 November 1934, OF10 Box 2, Folder: DOJ Nov–Dec 1934 (Box 2).

August and Cummings considered the president's presence so important that in September he began preparing its schedule around Roosevelt's convenience.<sup>328</sup> The event was postponed one month to accommodate the president and the opening was scheduled in the evening to fit his schedule.<sup>329</sup> Convening authorities on the traditionally local question of crime and punishment could no longer claim the same legitimacy without the president there. Crime was now a national matter.

In his address, Roosevelt gave a clear articulation of his crime and punishment agenda. It was a distinctively New Deal agenda, but one that the conference goers could embrace, whatever their politics. The president identified the protection of Americans "against the attacks of the lawless and the criminal elements" as a "component part" of the greater "objective" of "feeding and clothing the destitute," and securing America's "agricultural, industrial and financial structures." He praised the cooperation among national, state and local agencies, spearheaded by the Justice Department, attributing its setbacks to the "unscientific administration and lack of public support and understanding" along with poor local interagency coordination. The crime problem was national, due to interstate commerce of stolen goods and illegal drugs. Effective prosecutors and judicial intelligence needed to proceed thoughtfully, and avoid relying too heavily either on probation and parole or on "mere repression." Nothing could replace "expert service" to coordinate the power of "home, school, church, community and other social agencies, to work in common purpose with our law enforcement agencies." To handle crime would require "Scientific research, highly trained personnel, [and] expert service," as Roosevelt found "unscientific methods" to generate "heartbreaking results," whereas "scientific care" could ensure the cooperation of "every crime-preventing, law-enforcing agency of every branch of Government." America would need to address crime as a holistic problem, to treat with sincerity "great crimes, lesser crimes and little crimes," a task for which, Roosevelt lamented, "public opinion" was not prepared.<sup>330</sup>

The rest of the conference demonstrated the triumph of the New Deal vision and the strength of Cummings's coalition. Those traditionally associated with social science and welfare liberalism signed on to the practical need to suppress crime through amplified police powers and a larger criminal code. Those traditionally associated with the states' repressive elements gave lip service to the need for a holistic, preventive approach to crime as a welfare problem. The crowd emitted palpable enthusiasm for Cummings. Sheldon Gleuck, a scientific criminologist, celebrated that Cummings's department was "becoming the symbol of efficiency in the apprehension and prosecution of criminals"<sup>331</sup> J. Edgar Hoover credited Cummings for bringing "to the high office which he holds, an indefatigable spirit and an appreciation of the practical side of criminal investigative work."<sup>332</sup> Editor-in-Chief Fulston Oursler thanked Cummings as well as Hoover for "winning some important battles" in a crime crisis that he called "an actual

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<sup>328</sup> Hebron, James M, August 20 1934, OF10 Box 2, Folder: DOJ July–Oct 1934; Stephen Early to McIntyre (Telegram) 13 September 1934 OF DOJ Box 2: July–Oct 1934.

<sup>329</sup> Kannee to White House, 22 September 1934, OF10 Box 2, Folder: DOJ July–Oct 1934; Cummings, Homer, 25 September, 1934, OF10 Box 2, Folder: DOJ July–Oct 1934.

<sup>330</sup> Address to the Conference on Crime, December 10, 1934, APPUCSB.

<sup>331</sup> Sheldon Glueck, National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>332</sup> John Edgar Hoover, Director, Division of Investigation, "Detection and Apprehension," National Conference on Crime, Washington, D.C., 11 December 1934.



civil war.”<sup>333</sup> Sanford Bates flagged Cummings’s “enlightened leadership.”<sup>334</sup> The Attorney General had become the nation’s leader against lawlessness.

Such recognition also came from Republican Harry Anslinger, the Treasury Department’s most famous crime crusader. Anslinger reiterated the Treasury Department’s regulation of narcotics for medical purposes. He touted the Treasury’s successes, including the deportation of 450 people for narcotics violations. He called for more cooperation from state licensing boards. “We enjoy complete cooperation from The Attorney General, District Attorneys, and from Mr. J. Edgar Hoover and his men in the Bureau of Investigation,” Anslinger assured the crowd. A recent narcotics bust involving such coordination had revealed the “perfection of this machinery.”<sup>335</sup> Republicans and Democrats, Treasury and Justice, wets and dries, now stood together to celebrate the new nationwide campaign to hone the infrastructure that arose from World War I and the Volstead Act and direct it against drugs.

Cummings reciprocated the proliferation of fondness, grateful that the conference was “renewing old friendships and . . . establishing new ones.” His coalition’s “willingness to cooperate” made it all possible. In his own address, Cummings advocated his vision for crime control, but stressed the need to “quickly reach common ground.” His vision was accommodating but bold. Modern crime required social science and an “extension of federal power,” and cooperation amongst many different institutions.<sup>336</sup> The dominant approaches to crime, which had previously been at war with each other, now united under Cummings’s ecumenical war against criminals.

Cooperation and agreement characterized almost every bit of the event. This included the community of lawyers most conspicuously critical of the New Deal. Scott Loftin on behalf of the American Bar Association announced that the rights to “life, liberty, and the pursuit of happiness” absolutely required security “against the assaults of the criminal element.” Whereas such undertakings as the Wickersham Commission had produced few policy results—the Commission had even gone out of print—the ABA section had worked with the Social Science Research Council, the American Psychiatric Association, the National Crime Commission, the American Medical Association, the American Prison Association, the International Association of Chiefs and Police, and the American Law Institute to produce meaningful reform proposals, particularly for the state governments.<sup>337</sup> William Draper Lewis from the American Law Institute promoted his organization’s model Code of Criminal Procedure, endorsed by the American Bar Association.<sup>338</sup> Generally critical of New Deal legal thought, the ABA fit comfortably within the war on crime coalition.<sup>339</sup>

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<sup>333</sup> Fulton Oursler, Editor-in-Chief, *Liberty Magazine*, “Opportunities of the Press in War against Crime,” National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>334</sup> Sanford Bates, Director, Bureau of Prisons, “Protection as a Penal Policy,” United States Department of Justice, Delivered at The Attorney General’s Conference on Crime, Washington, D.C., 12 December 1934.

<sup>335</sup> Address by Commissioner of Narcotics, Harry J. Anslinger, National Conference on Crime, Washington, D.C., 13 December 1934.

<sup>336</sup> Address of Honorable Homer Cummings, Attorney General of the United States, National Conference on Crime, Washington, D.C., 10 December 1934.

<sup>337</sup> Scott M. Lofflin, “Opening Remarks,” National Conference on Crime, Washington, D.C., 12 December 1934.

<sup>338</sup> William Draper Lewis, American Law Institute, Philadelphia, “Restating Criminal Law and Improving Criminal Procedure,” National Conference on Crime, Washington, D.C., 13 December 1934.

<sup>339</sup> For more on the American Bar Association, see “The War on Crime Constitution,” chapter 6 of this dissertation.

Those allied with modern liberalism could demand a huge expansion of national power. Scientific criminologist Sheldon Gleuck railed against police abuses and unscientific patrolling methods. He explained the problem of American law and order as arising from the “patchwork of inconsistencies” in American legal development and lamented the “same lack of central planning and control that characterized the military efforts of the allies until the coming of [Ferdinand] Foch and centralized command.” Gleuck also quoted Cummings on “glorification of the criminal classes. Far too often the gangster is depicted as a hero with good qualities of mind and spirit, while the police officer is represented as a mean or heartless individual, gluttoned with authority and stupid in the performance of his duty.”<sup>340</sup> Progressive criminology now shared with J. Edgar Hoover the fixation on stamping out the romanticization of gangster culture.

Nuanced disagreements on centralization were present but not debilitating. Earl Warren, District Attorney of California’s Alameda County, lamented the “decentralized system of law enforcement,” called for state departments of justice and predicted that most law enforcers would “gladly submit to the supervision.”<sup>341</sup> Gilbert Bettman, on the other hand, warned against the bureaucratic and anti-democratic implications of too much centralization within each state. He touted the county as “the historical unit of government,” and warned that state politics can be as corrupting as local politics. “What reason is there to expect that higher ideals pervade state than county affairs? How about Huey Long?”<sup>342</sup> The more extremist currents on behalf of criminal-justice centralization only served to make the war on crime coalition’s pragmatic liberalism appear moderate in comparison.

The differences in opinion could threaten to become differences in principle, and Cummings’s faced the task to reconcile them and keep the coalition together. So far he had achieved this balance, and the next few years would test him further. The emphasis on federal and state cooperation allowed the New Dealers to reconcile concerns about federalism. Duke Law School’s Justin Miller reassured the audience that the press wrongly reported that the New Deal had “deprived” the states of “their traditional control of crime.” He conceded that a lot had changed since 1789, the year the Constitution was adopted, that required innovations in interstate commerce power and fugitive pursuit, but he stressed that in the end local authority should control local crime.<sup>343</sup> Gordon Dean championed interstate compacts, anticipated in the Constitution but rarely used, that could allow federal involvement “without any concessions being made so far as states rights is concerned.”<sup>344</sup> Anslinger noted that under the Constitution, only a Uniform Act harmonizing drug policy across the states could effectively prohibit drugs nationwide.<sup>345</sup>

Promising to defer to the states selectively also pleased the Southern contingent and welcomed it into the War on Crime Coalition—all the while hopes that federal “crime” would eventually include racial terror provided a breach for an aspirational African-American activism.

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<sup>340</sup> Sheldon Glueck, National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>341</sup> Earl Warren, “Organizing the Community to Combat Crime,” National Conference on Crime, Washington, D.C., 12 December 1934.

<sup>342</sup> “Centralization of State Prosecuting Agencies,” Address by Gilbert Bettman, Cincinnati, Ohio, AGCC, 11 December 1934.

<sup>343</sup> “The Federal Government and the Crime Problem,” National Conference on Crime, Washington, D.C., 12 December 1934.

<sup>344</sup> Gordon Dean, National Conference on Crime, 11 December 1934.

<sup>345</sup> Address by Commissioner of Narcotics, Harry J. Anslinger, National Conference on Crime, Washington, D.C., December 13, 1934. For more on Anslinger and narcotics, see “Worse than Murder,” chapter 5 of this dissertation.

North Carolina Governor J.C.P. Ehringhaus thanked Cummings “on behalf of the Governors of the several states.” He appreciated Cummings’s ability to balance federal and state power.<sup>346</sup> As enthusiasts for the war on crime convened at the conference, outside picketers from the National Association for the Advancement of Colored People protested the administration’s failure to combat lynching. Several of these picketers were arrested and their particular grievance would Roosevelt would not address their grievance. *The Chicago Defender* mocked the Conference’s having “roundly scored” all the “minor infractions of the law” while neglecting the “real monster” of lynching, so dangerous to the “progress of Christianity and civilization.” The editorial found itself “compelled to regard this highly-publicized meeting as just another ‘noble experiment.’”<sup>347</sup> The paper did report, seemingly with some hope, that the conference’s delegates formally condemned the use unlawful “methods” used in “industrial conflicts and racial antagonisms.”<sup>348</sup> While alienated from the war on crime coalition, African-Americans and racial liberals exposed the hypocrisy of the conference to express their desire for inclusion.

The progressive emphasis on the broad cultural causes of crime also got a hearing. Charles W. Hoffman of the Cincinnati Juvenile Court argued that “crime has its origin in childhood.”<sup>349</sup> Katharine Lenroot called for more flexibility in juvenile law, saying “our concepts of idleness, vagrancy and nomadism” did not suit the modern world, and that maybe the Civilian Conservation Corps could do more to employ troubled youth.<sup>350</sup> Numerous talks focused on the problem of culture. H.V. Kaltenborn contemplated radio shows on crime.<sup>351</sup> Grove Patterson and Stanley Walker considered the scourge of newspaper coverage.<sup>352</sup>

Above all, the conference encapsulated the holistic approach the New Deal offered the war on crime—preventive and repressive, scientific and messianic, humane and unrelenting. No longer would a conflict divide economic liberalism from the war on crime. Anslinger touted the Public Health Service, the narcotics farms, and the need for the “Penal and Correctional method” to “be supplemented by medico-social work.” We need “humane treatment. . . continued by supplementary assistance.”<sup>353</sup> Prison Bureau Director Sanford Bates affirmed probation, as not “everyone can be put in prison.”<sup>354</sup> Earl W. Evans lamented the decline in respect for the law, arguing that all other political issues were of secondary importance to the “war without cessation” against crime, a battle in the “eternal war against sin.”<sup>355</sup> James A. Johnson, the warden of Alcatraz, argued against “too much punishment,” which “may be worse than none at all,” and argued that prisons should be “bettered, improved, modernized, humanized,” so the

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<sup>346</sup> J.C.P. Ehringhaus, Governor of North Carolina, “The State’s Crime Problem,” National Conference on Crime, Washington, D.C., 12 December 1934.

<sup>347</sup> “The Crime Conference,” *Chicago Defender*, 22 December 1934.

<sup>348</sup> “Mob Violence Hit in Program,” *Chicago Defender*, 29 December 1934.

<sup>349</sup> Charles W. Hoffman, Cincinnati Juvenile Court, “Children & Crime,” National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>350</sup> Katharine F. Lenroot, “Old and New Methods of Dealing with Vagrants and the Delinquents,” National Conference on Crime, Washington, D.C., 13 December 1934.

<sup>351</sup> H.V. Kaltenborn, “Radio and Crime,” National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>352</sup> Grove Patterson, American Society of Newspaper Editors, Dec 11; Stanley Walker, Copy Editor, New York Herald-Tribune, The Newspaper and Crime, 11 December 1934.

<sup>353</sup> Address by Commissioner of Narcotics, Harry J. Anslinger, before the National Conference on Crime, Washington, D.C., 13 December 1934.

<sup>354</sup> Sanford Bates, Director, Bureau of Prisons, United States Department of Justice, “Protection as a Penal Policy,” Delivered at The Attorney General’s Conference on Crime, Washington, D.C., 12 December 1934.

<sup>355</sup> Earl W. Evans, “Crime, the Community and the Lawyer,” Wichita, 12 December 1934.

“finest prison we can build will stand as a monument to neglected youth.”<sup>356</sup> The New Deal approach, harmonizing incarceration and welfare, proved most accommodating to a very broad coalition.

But the New Dealers would not disown repression. Far from it. J. Edgar Hoover’s address celebrated the state violence that Cummings had allowed his Bureau to unleash upon organized crime. Thanks to the empowered Bureau and the “cooperation of city, State and National law enforcement agencies,” the United States was finally suppressing the domestic enemy:

John Dillinger, the flag-bearer of lawlessness, is dead, killed by Federal bullets. “Pretty Boy” Floyd, who for years laughed at the law— lies in his grave, dead of gunshot wounds inflicted in open battle by our Special Agents. The career of “Baby Face” Nelson is over; he died of seventeen bullet wounds while two of the finest men I ever knew, gave their own clean lives that they might serve society by ending his filthy one. Wilbur Underhill no longer carries the name of the Tri-State Terror. He, too, is gone, as well as such men as Homer Van Meter, Tommy Carroll, and others. That is progress.<sup>357</sup>

“Federal bullets” meant federal “progress.” Hoover emphasized the power of national guns, but his address easily reconciled him with the New Deal vision. He cheered coordination between the feds and locals, since the “campaign against crime depends as much upon the county sheriff as upon the police of the largest city.” He decried the corrupt politicians and the “wealth and privilege,” the “deference to political pull” that had made a mockery of American justice. He celebrated the social science of fingerprinting, forensics, and crime labs. While he said the criminal only understands one threat—the “certainty of going to the penitentiary”—and while he called the criminals, “vermin,” and his fellow agents, “soldiers”—he also paid deference to crime prevention. “Given the right kind of respect for law,” the world’s many potential Dillingers, Floyds, and Nelsons could “become good citizens.” J. Edgar Hoover saw the place for rehabilitation and social reform, as did the others at the conference. But should such approaches fail, the others knew that Hoover’s Bureau would unflinchingly wage “a war to the death.”<sup>358</sup>



After two years in office, the quantitative impact of Roosevelt’s policies on crime was hard to assess. The FBI statistics on per capita crime rates revealed mixed results. Crime rates were peaking when Roosevelt took office. From 1932 to 1933, robberies and auto thefts per capita had fallen, but aggravated assaults and larcenies crept upward. From 1933, the last year of Prohibition, to 1934, non-negligent homicides continued to fall, as did robberies, burglaries and

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<sup>356</sup> James A Johnston, Alcatraz Warden, “The Function of the Modern Prison,” National Conference on Crime, Washington, D.C. On July 1, 1934, Cummings had issued the order establishing the prison on Alcatraz, just off the coast of San Francisco Order establishing a United States Penitentiary, July 1, 1934, in Swisher, *Selected Papers of Homer Cummings*, 32.

<sup>357</sup> John Edgar Hoover, Director, Division of Investigation, “Detection and Apprehension,” National Conference on Crime, Washington, D.C., 11 December 1934.

<sup>358</sup> John Edgar Hoover, Director, Division of Investigation, “Detection and Apprehension,” National Conference on Crime, Washington, D.C., 11 December 1934.

auto thefts. More rapes were reported in 1934 than in either 1932 or 1933, but non-negligent homicide rates were down.<sup>359</sup>

In qualitative terms, by the end of 1934 the strength of the war on crime coalition became undeniable. Amidst an organized crime panic, an atmosphere of political extremism, and the volatile process of winding down Prohibition, Cummings and Hoover had reached across partisan and institutional lines to develop a consensus on how to move forward with an activist law and order agenda. The consensus accommodated a great diversity of approaches, interests, and agencies. Under Cummings the Department of Justice enjoyed more power than ever, and yet the Department of Treasury could continue in the realm of law enforcement despite the end of Prohibition, the original rationale for bringing it back in the mix.

Roosevelt later recalled that from the “beginning of my Administration” he knew that “the Federal legal and administrative machinery for the detection, prosecution and punishment of crime required complete overhauling,” and he undertook to do exactly that.<sup>360</sup> Having won on a campaign to end Prohibition, Roosevelt gave federal law enforcement unprecedented power, which never again waned. He armed Hoover’s Division Investigation, once weak and controversial, for war on the streets of America, and set it on the path toward professionalization and expansion far beyond the 1920s imagination. The federal criminal code enjoyed unprecedented expansion into areas previously untouched by national law. At the same time, Southerners jealous of states’ rights could believe their local institutions if repression would remain intact while organized labor held out the hope that for the first time the federal police would side with them.

Roosevelt managed to salvage, legitimate, and expand the federal government’s law enforcement machinery, the first president to do so since the challenges posed by the Black Codes and redeemers to dreams of a sustainable Reconstruction. The chaos of legitimacy that befell American politics, so inextricably rooted in widespread distrust in national law enforcement power, characterized the principal predicament of American government since 1865. The aspiration that the United States would have something akin to a unitary central authority, albeit shared with the individual states, could not materialize if federal institutions, various levels of government, regional divisions, racial and class resentments, and partisan politics continued to prevent the consolidation of the most basic powers that define a nation-state. This accomplishment did not arise merely as the natural confluence of New Deal politics and the early 1930s war on crime. Roosevelt had the fortune of Cummings rather than Thomas Walsh taking over the Justice Department, and bringing with him a legal mind, organizational zeal, and political appeal. Nor was the New Deal’s preservation of the war on crime a short-lived success. By solving the predicament of national authority rooted in the late-nineteenth century, by the end of 1934 Roosevelt and Cummings finally established the foundations for the twentieth-century dynamics of national domestic power.

The New Dealers managed a popular war on crime complementary to their transformative impact on liberalism. Whereas federal law enforcement powers had previously provoked widespread dissatisfaction, the war on crime was now good liberal politics. In turn, as with domestic politics in general, the experiences of New Deal experimentation, governance, and political compromise determined the character of the liberal agenda. For the rest of the 1930s,

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<sup>359</sup> Uniform Crime Reports, U.S. Bureau of Investigation, Washington DC, Volume 3, Number 4, January 1933, 4.

<sup>360</sup> Franklin D. Roosevelt, *Public Papers of the Presidents of the United States, F.D. Roosevelt, 1934, Volume 3*, 242–43.

New Deal liberalism and the war on crime would shape each other. The progressive notion of “crime prevention” would become the intellectual currency binding the federal government’s enforcers and prisons to criminologists and social activists throughout the country. Harry Anslinger’s Narcotics Bureau would find new frontiers of criminalization and work within Morgenthau’s Treasury Department to replace the project of Prohibition with a New Deal war on drugs. A novel liberal constitutionalism would bring together progressives and conservatives hostile to social regulation behind an expansive view of both federal and state criminal justice. After 1934, New Deal mobilization could convincingly maintain a burgeoning and distinctively liberal security state apparatus, shepherding it intact to the next international war. The war on crime would never be the same again, and neither would American liberalism or the American state.

### Chapter 3

#### *New Deal Criminology*

Having adopted the war on crime from their predecessors, the New Deal government did more than expand infrastructure, aggrandize the criminal code, and amplify the brute force directed against gangsters. In the early summer of 1934, as anxieties about racketeering and kidnapping still dominated, Roosevelt signaled that his administration would take the crime issue further. While signing legislation to increase the Bureau of Investigation's powers, the president promised a relentless undertaking of "gangster extermination," but also touted a "broader program designed to curb the evil-doer of whatever class."<sup>361</sup> The New Deal state gave unprecedented attention to the idea of crime control as a holistic project, worthy of intensification at the national and local levels, engaging institutions from across government and social life. Attorney General Homer Cummings and America's law enforcement elites and academics knew that federalism and tradition constrained the effective reach of national police power, which only intensified their emphasis on intellectual leadership. The most ambitious dimension was the federal embrace of *crime prevention*, which usually meant preempting criminal tendencies in juveniles, but could also extend far beyond that focus.<sup>362</sup>

Under Cummings crime prevention never materialized into concrete policy reforms, but the idea sustained the Justice Department's intellectual energy throughout the 1930s, only to fade from the national spotlight for decades following.<sup>363</sup> Cummings's Crime Conference in December 1934 was both a reaction and a provocation, responding to organized crime and calling on the nation's experts behind a new federal science of law and order. The leftover machinery of the prohibitionist state combined with the aspirations of crime prevention could take the war on crime to new frontiers.<sup>364</sup> The idea was conceptually capacious and increasingly abstract. Its most constant expression became the search for its own institutional permanence. Just as important, crime prevention became the criminological language that Cummings's Justice Department appropriated and redefined to accommodate the most progressive and most conservative components of the war on crime coalition. In doing so, the Roosevelt administration

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<sup>361</sup> Roosevelt, Statement on Signing Crime Bill, 18 May 1934, APPUCSB.

<sup>362</sup> By the early 1930s, most material on "crime prevention" concerned juvenile delinquency. See Herman M. Adler, "The Work of Institutions in the Prevention of Delinquency," *Journal of Juvenile Research* 15, no. 18–27 (1931): 549.

<sup>363</sup> Intellectual histories of 1930s criminology tend to focus on academic debate, such as the prevailing of Edwin Sutherland's sociological approach over the multidisciplinary study of the Gluecks, and to silo such discourse from practical politics. See John H. Laub and Robert J. Sampson, "The Sutherland–Glueck Debate: On the Sociology of Criminological Knowledge," *American Journal of Sociology* 96, No. 6 (May 1991): 1402–1440. John Galliher traces the classic roots in Bentham and Lombroso through the modern social science transformation, yielding a theoretical "positivism [with] liberal reformist political implications" and "perhaps reflecting widespread sentiment supportive of New Deal politics." John F. Galliher, "The Life and Death of Liberal Criminology," *Contemporary Crises* (1978): 2, 245–263, 246.

<sup>364</sup> Lisa McGirr notes that "Roosevelt's New Deal war on crime grew out of the prohibition wars," but only discusses it for a couple pages and leaves open big questions for future scholarship. "The repeal of Prohibition did not signal an end" to the federal "crime control that began in 1919," McGirr writes, mentioning the nine pieces of crime legislation in 1934. This raises the question as to how exactly the war on crime was amplified even as crime fell. Prohibition had "left a powerful imprint on the federal state, tilting it toward policing." McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: W.W. Norton, 2015), 218, 221.

could legitimate an ever-expanding role for the national government in a changing American culture.

Approaching New Deal liberalism through the intellectual history of criminology is nothing new, but scholars have tended to frame the intersection in opposition to the repressive state.<sup>365</sup> Liberals in the 1930s, we often read, stood in contrast to the reformers arising out of the Progressive Era, who elevated policing as a practitioner's art but prioritized professionalization over social welfare. The New Deal moment of criminological clarity is also compared to the later-twentieth-century reliance on coercion.<sup>366</sup> What little focused work historians have done to explore the New Deal war on crime in respect to liberal ideology has tended to highlight the opposition.<sup>367</sup> In *War on Crime*, Claire Potter finds that Justin Miller, an authentic liberal who headed up the Attorney General's Advisory Committee on Crime, embodied a progressive vision of crime fighting whose contradictory embrace of both "decentralized community work" and "a strong state" lost out to the coherent national policing vision of J. Edgar Hoover.<sup>368</sup> But in fact, there was no irreconcilable tension between Miller and Hoover, and it was only in the late 1930s that the allure of Miller's crime prevention vision proved too contagious for its own good. While scholars search the past for a path not taken in holistic criminal justice strategy, they have largely neglected the lessons of the original rise and fall of such a national approach in the 1930s.

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<sup>365</sup> It is conventional to see the New Deal state and security state at odds. Richard J. Barnett characteristically argues that "The New Deal agencies concerned with social security, development, and economic justice lost the lion's share of the budget and the power to shape national priorities to those agencies with one mandate or another to protect national security." "The Ideology of the National Security State," *The Massachusetts Review* 26, No. 4 (Winter, 1985), pp. 483-500. Ira Katznelson capaciously defines the New Deal to include foreign policy and FBI surveillance but does not explicitly address crime in *Fear Itself: The New Deal and the Origins of Our Time* (New York: W.W. Norton & Company, 2013). Kenneth O'Reilly addresses federal law enforcement but mostly surveillance as New Deal phenomena in "A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security," *The Journal of American History* 69, No. 3 (1982) and "The Roosevelt Administration and Black America: Federal Surveillance Policy and Civil Rights during the New Deal and World War II Years," *Phylon* 48, No. 1 (1987), 12-25. A similar connection is seen in Rhodri Jeffreys-Jones's work, particularly in *The FBI: A History* (New Haven, CT: Yale University Press, 2007).

<sup>366</sup> Accounts criticizing August Vollmer-style professionalization tend to privilege New Deal liberalism above the practitioners' progressivism that came before as well as what followed, a mid-century liberal criminology that turned its back on activism and the human needs of those deemed criminals. Blaming "bourgeois ideology that turned its back on activism and the absence of a Marxist tradition," Tony Platt, writing in 1974, identified liberalism as the "prevailing ideology which dominates research and theory in criminology" and critiqued liberal criminology's complacency in accepting the state definition of crime, stressing reformism, neglecting class analysis, lacking "empathy" and embracing pragmatism. Tony Platt, "Prospects for a Radical Criminology in the United States," *Crime and Social Justice*, No. 1 (Spring-Summer 1974), 2-10. Yet by 1984, Platt was more willing to define the Left "broadly to include all progressive liberals," and conclude there was "no single radical tradition" of criminology. This big-tent approach carried its own pragmatic implications. Progressives had shown the failure of some radicals to take crime seriously, ceding the ground to the law-and-order right, and now that the "collapse of New Deal liberalism" pushed "many intellectuals to the left," Platt identified an opportunity to mobilize the left behind such agendas as prosecuting white-collar crime. Platt, "Criminology in the 1980s: Progressive Alternatives to 'Law and Order,'" *Crime and Social Justice*, No. 21/22, International Lawlessness and the Search for Justice (1984), 191-199.

<sup>367</sup> An important exception is David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001), which discusses the New Deal era as part of a larger arc of penal-welfarism modern Atlantic history. See "Building Carceral Liberalism," chapter 4 of this dissertation, for a more on welfare penology.

<sup>368</sup> Claire Bond Potter, *War on Crime: Bandits, G-Men, and the Politics of Mass Culture* (New Brunswick, NJ: Rutgers University Press, 1998), 184.



As much as its rise, the fall of federal crime prevention sheds light on the idea's long-term impact on liberal governance. It was not in the Justice Department but in the Treasury that the idea became most radical, capacious, and ambitious. It was there that the idea truly over-extended itself and collapsed. The very accessibility of the notion of crime prevention, its flexibility, and its universalism, burdened the project with an unsustainable aspirational quality. The intractable conflict was not between community and the nation state, but within the logic of crime prevention itself, whose unlimited ambition drove an embrace of both punishment and welfare. Rather than posing an alternative to repression, New Deal criminology promised a powerful state that would erode the boundaries between the punitive and therapeutic, and while its internal contradictions eventually proved unstable, this ideal served as the intellectual currency of the war on crime coalition, tethering the national government to local jurisdictions and civil society.

### Nationalizing Crime Prevention

The Roosevelt administration's approach to crime prevention was both holistic and ecumenical. Its diverse adherents agreed that prevention was constitutive of domestic security—economic security, social security, or even national security. Speaking mostly to the organized crime wave, Roosevelt himself targeted “lawless and the criminal elements” as a “component part” of the greater “objective” of “feeding and clothing the destitute” and advocated “expert service” to coordinate the power of “home, school, church, community and other social agencies” and “scientific research.”<sup>369</sup> In his second term, speaking more generally, the president thought “good government” should get “rid of evil social conditions which breed crime” and could potentially “prevent a thousand crimes for every one it punishes.”<sup>370</sup>

The New Deal state emerged uniquely capable of indulging both the social welfare and academic dimensions of crime prevention. Its enthusiastic embrace of what had previously been a mostly academic and social-welfare program lacking an institutional center served a political purpose, both partisan and in broader terms of national legitimacy. The Women's Division of the Democratic National Committee prepared a press release in November 1935 that featured comments on crime prevention by Stella Akin, special assistant to the Attorney General. Akin praised Cummings as well as the new FBI training school.<sup>371</sup> In a more general sense crime prevention served to legitimate a national vision that brought together social reform and coercive power. Even in the narrower focus on juvenile delinquency, economic security had to undergird the social health of youth. Chicago economist Paul Douglas, whose partisan loyalties shifted out of disappointment with the Democrats' milquetoast devotion to labor, nevertheless summed up the New Deal approach in a pamphlet published while he served on the National Recovery Administration's Consumer Advisory Board. Douglas identified the Depression's destabilizing effect on children and concluded that “happy” people with “expansive and rounded personalities” needed to “feel relatively secure,” which required feeling “the everlasting arms or.

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<sup>369</sup> Franklin Roosevelt, Address to the Conference on Crime, 10 December 1934, APPUCSB.

<sup>370</sup> Franklin Roosevelt, Radio Address on the Election of Liberals, 4 November 1938, APP UCSB.

<sup>371</sup> Bureau of Publicity, Democratic National Committee, Women's Division, National Press Building, Washington, D.C., for Release after Thursday, October 31<sup>st</sup>, 1935, MWDP Box 9.

. . . perhaps even better still, the feeling that their family will be protected economically.”<sup>372</sup> Douglas represented the trending understanding of social welfare as the strategic key to shielding society against lawbreaking.

Cummings’s Justice Department provided an institutional framework where crime prevention theory could legitimize instruments of enforcement. From the beginning, the Roosevelt administration’s progressive vision of crime prevention drew on the complementary and diffuse ideas of the early 1930s. The first crime prevention institutions saw the issue as a basic problem of law and order. New York’s Society for the Prevention of Crime, founded in 1878, recommended “swift and certain enforcement” in a streamlined criminal legal system, and was also concerned with public opinion, firearms, gambling, and institutional corruption.<sup>373</sup> After World War I, academic interest in “crime prevention” exploded. The idea usually focused on reducing juvenile criminality.<sup>374</sup> The proactive emphasis on prevention was often contrasted with repression.<sup>375</sup> By the early 1930s, many institutions had taken up the charge of crime prevention, usually with a focus on preempting criminal tendencies in youth. Such institutions included Wisconsin’s Conference on Social Work, the Social Science Research Council, the National Economic League, the privately supported Crime Prevention Association, and the Committee on Social Hygiene.<sup>376</sup> Often such hygiene organizations connected with reformatory institutions seeking alternatives to pure punishment.<sup>377</sup> Cummings’s Justice Department would take notice of the behavioral clinics and special programs oriented toward crime prevention in Berkeley, Colorado, Chicago, Detroit, Minneapolis, Cincinnati, and Pittsburgh.<sup>378</sup>

Progressive criminologists, both practitioners and academics, added intellectual texture to the idea. Berkeley Police Chief August Vollmer served to bridge the progressive era movement for practical reform to the rise of academic criminology. From 1905 through 1932, he won the lasting reputation as America’s most iconic police reformer, introducing police bicycles, efficient records, and the *modus operandi* system, and training a generation of acolytes who revolutionized departments nationwide.<sup>379</sup> His contribution to the National Commission on Law

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<sup>372</sup> Paul H. Douglas, Child Welfare Pamphlets No. 38, “The Impact of Recent Social and Economic Changes Upon the Family,” 1934, in AGACC, Box 5, Folder: Economic Factors in Crime.

<sup>373</sup> Samuel Marcus, Society for the Prevention of Crime, to Cummings, 13 December 1934, in AGACC, Box 2, Folder: Crime Prevention.

<sup>374</sup> See William G. Hale, “Crime: Modern Methods of Prevention, Redemption and Protection,” in *Journal of Criminal Law and Criminology* v. 9, August 1918; Robert H. Gault, “Psychiatric Clinics for the Prevention of Delinquency” *Journal of Criminal Law and Criminology* v. 9, 1919, 477–479.

<sup>375</sup> See F.W. Jenkins, *Crime Prevention and Crime Repression*, Russell Sage Foundation no. 81, February 1927; Thomas Orbison, “The Prevention of Crimes in Mental Delinquency,” *Journal of Delinquency* v. 11 (1927).

<sup>376</sup> *Committee on Crime and Criminal Justice* (Wisconsin Conference on Social Work, 1930); Augustus Frederick Kuhlman, “Crime Prevention,” in *A Guide to Material on Crime and Criminal Justice* (Social Science Research Council, 1929); Thomas C.T. Crain, *Crime: Its Prevention and Punishment*, (National Economic League, July 1930); Outline of Crime Prevention, Memo to EH Randolph, in AGAC SF, Box 5, Folder: Crime Prevention; on the Committee of Social Hygiene see Edith Rockwood and Augusta J. Street, “Social Protective Work of Public Agencies, with Special Emphasis on the Policewoman” (Washington, D.C.: National League of Women Voters, Committee on Social Hygiene, April 1932).

<sup>377</sup> See Helen Geiger to Waters, 11 July 1932, MVWP Box 15, Folder 71.

<sup>378</sup> “Educational Programs for Crime Prevention” in AGAC SF, Box 5, Folder: Economic Factors in Crime.

<sup>379</sup> Gene E. Carte and Elaine H. Carte, *Police Reform in the United States: The Era of August Vollmer, 1905–1932* (Berkeley: University of California Press, 1975), 22–23.

Observance and Enforcement, also known as the Wickersham Commission, was best known as the most comprehensive and critical U.S. survey of urban police and police abuse. But it also advanced crime prevention in favorable and capacious terms. Vollmer criticized police departments for neglecting “crime prevention as a distinct function.”<sup>380</sup> He brought his dual emphasis on practical policing and multidisciplinary approaches to social welfare to the University of California, Berkeley, where he founded the first academic department of criminology. Even after his retirement in 1933, Vollmer took particular interest in juvenile welfare, praising the New York Police Department’s Crime Prevention Bureau and seeking a modern outfit at the national level.<sup>381</sup> Vollmer so prioritized the idea that he characterized Nazi Germany’s militant policing in 1933 as a problem of deficiency in crime prevention.<sup>382</sup>

If Vollmer stood for both police reformers and Berkeley’s academic criminologists, Sheldon and Eleanor Glueck furnished the imprimatur of Harvard Law School. The Guecks saw the problem of social dysfunction requiring a multi-layered constellation of social and institutional remedies, yet their research had pessimistic implications. The husband and wife conducted a study published in 1930 that questioned the efficacy of the Massachusetts Reformatory, and undertook a more comprehensive Harvard Crime Survey.<sup>383</sup> Their 1933 study of a thousand delinquent boys identified key themes—native born sons of foreign parents, low educational achievement, inferior intelligence, bad educational equipment, and bad economic conditions, nine-tenths of the problem kids hailing from “broken homes.”<sup>384</sup> More so than Vollmer’s approach, their criminology often lent itself toward emphasizing incarceration. Sheldon Glueck taught at Harvard’s Institute of Criminal Law, which organized a curriculum for correctional administrators.

Both the Berkeley and Harvard approaches gained attention in the Justice Department thanks in part to the academic orientation of Justin Miller, who became Cummings’s Special Assistant in 1934. Miller had law degrees from the University of Montana and Stanford, and practiced law in an activist capacity on behalf of the California State Commission on Immigration and Housing before returning to the academy. He was a law professor at the University of Oregon, the University of California, and the University of Southern California before becoming dean of the Duke University Law School, a job he maintained while beginning his work for Cummings.<sup>385</sup>

Although provisional in their articulation, both the institutional and intellectual goals of national crime prevention were showcased at Cummings’s 1934 Crime Conference. A resolution recommended the creation of an Advisory Committee on Crime. Cummings used the phrase “crime prevention” at the conference opening and closing, stressing a new opportunity.<sup>386</sup> The modern state was the “instrument through which citizens may apply their reasoned methods of

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<sup>380</sup> National Commission on Law Observance and Enforcement, Report on Police, Washington DC, 26 June 1931, No. 14, 111.

<sup>381</sup> Vollmer to Alida C Bowler, 21 May 1934, AVP Box 43; To Alida C. Bowler, Children’s Bureau, U.S. Dept. of Labor 15 August 1933, in AVP Box 42.

<sup>382</sup> Vollmer to OW Wilson, 1 September 1933, AVP Box 43.

<sup>383</sup> “Reformatories that Do Not Reform,” *The Literary Digest*, 1 March 1930, in PETSOG Box 24, Folder 7.

<sup>384</sup> Sheldon and Eleanor Glueck, Memorandum on Characteristics of Delinquent Boys as Found in 1,000 Juvenile Delinquents, 1933, in AGAC SF Box 3, Folder: Causes of Crime (2).

<sup>385</sup> Federal Judicial Center, “Miller, Justin,” *Biographical Directory of Federal Judges*.

<sup>386</sup> From the opening address at the Crime Conference, 10 December 1934, in Swisher, *Selected Papers of Homer Cummings*, 51; “The Lessons of the Crime Conference,” address at the closing session of The Attorney General’s Conference on Crime, December 13, 1934, in Swisher, *Selected Papers of Homer Cummings*, 55.

prevention in addition to methods of correction,” and preempting crime was now possible, an aspiration he favorably compared to preempting wars or economic collapse. Government’s “present justification” was preemption of such catastrophes.<sup>387</sup> The modern state should privilege the production and dissemination of knowledge, and so Cummings “accept[ed] the responsibility” to create a “clearing house of information” about the many problems and approaches to crime, which had lamentedly not existed.<sup>388</sup>

Justin Miller did not want to lose momentum from the conference. He wrote to Cummings on Christmas Eve, urging a meeting as soon as possible.<sup>389</sup> Shortly after the New Year, Miller shared his outline for a Bureau of Crime Prevention. It would conduct research in criminology, educate prosecutors and law administrators, and study the causes and ways to prevent crime, both for adults and children. For adults, everything from vocational training and medical clinics to community agencies and anti-racket councils.<sup>390</sup> On January 4, 1935, Miller reiterated the “importance of continuity in advertising,” and did not want the “favorable impression to die out,” since the crime conference had been “universally recognized as having been highly successful.”<sup>391</sup> Disseminating the published proceedings of the crime conference served to maintain interest. Forty thousand copies of the addresses went out.<sup>392</sup> Requests for the proceedings continued to come through the next year.<sup>393</sup>

Public relations and outreach were more than a means to an end. Intellectual leadership was a goal in itself. The Advisory Committee could pursue two discursive purposes—the collection of any and all relevant information as a “clearing house,” and the promotion of crime prevention as an idea. Miller undertook to compile everything that community leaders saw as pertinent to nurturing juveniles, but also anything they considered important to the idea of “crime prevention.” By consulting community leaders, Miller hoped to be both student and teacher. Miller repeatedly lauded Cummings’s leadership for having encouraged the conversation—talk of coordinating councils for crime prevention was one of “many evidences.”<sup>394</sup> He boasted of having “stimulate[d] interest in crime prevention throughout the United States”<sup>395</sup> For Miller, still dean at Duke Law School, the Advisory Committee served the continuation of his own role

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<sup>387</sup> Message to the Fifth Annual Women's Conference, 17 October 1935, APP UCSB.

<sup>388</sup> AGAC SF Box 1, Folder: Agenda.

<sup>389</sup> Memorandum for the Attorney General, 24 December 1934, signed by Justin Miller, AGAC GC Box 1, Folder: Agenda.

<sup>390</sup> Memorandum for the Attorney General, Introduction: Bureau of Crime Prevention, 3 January 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

<sup>391</sup> Memorandum for the Attorney General, Subject: Attorney General’s Crime Conference—Public Opinion and Crime, 4 January 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936) (emphasis in original).

<sup>392</sup> AGACCGC Box 1, Folder: Agenda.

<sup>393</sup> Memorandum for the Attorney General, 20 May 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936); Memorandum for Mr. Miller, 1 July 1936. AGAC GC Box 1, Folder: Attorney General Memoranda (After Jan. 1, 1936).

<sup>394</sup> Memorandum for the Attorney General, 9 April 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (After Jan. 1, 1936).

<sup>395</sup> Memorandum for the Attorney General, 7 April 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (After Jan. 1, 1936).

as an educator.<sup>396</sup> For the Justice Department, Miller's work promised a theoretical dimension to the pragmatic New Deal war on crime.

The announcement of the Attorney General's Advisory Committee on Crime circulated to the many attendees of the 1934 Crime Conference, and suggested an undertaking that would offer something to everyone, from J. Edgar Hoover to New Deal liberals. It stressed its role as national, scientific, educational center in Washington. The center would improve personnel training and seek more well-rounded approach to treating criminals.<sup>397</sup> Notice of the new Advisory Committee went to all the December 1934 conference delegates.<sup>398</sup> Early internal plans foresaw efforts toward training federal investigators, parole officers, probation officers, prison officials, and prosecutors, more scientific research "under laboratory conditions," and more official recognition of the academic work done in colleges and universities.<sup>399</sup> The imprint of the Works Progress Administration, through which the funding was dispersed, branded as a New Deal program what was before a non-partisan progressive criminology.<sup>400</sup>

Justin Miller chaired the new committee, which included Judge Scott M. Loftin, Assistant Attorney General Keenan, J. Edgar Hoover, and Sanford Bates, head of the Bureau of Prisons, among others. The Advisory Committee soon took shape as a project of many hands but few masters. From the beginning, Miller ensured that a smaller group managed most day-to-day operations. Members of the larger committee were unavailable to attend all the meetings. On the other hand, Miller wanted many organizations represented to fulfill the vision of a truly integrative approach to crime.<sup>401</sup> He envisaged an Advisory Committee with him, Prison Bureau Director Sanford Bates, J. Edgar Hoover, and leaders of the criminological and legal communities inside and outside government. Its committee on research, which included many of the same people, underscored the intellectual orientation.<sup>402</sup> Miller also considered Roscoe Pound, the father of sociological jurisprudence, as a possible member of the Advisory Committee.<sup>403</sup> Miller did not want to take for granted this venerable group, and hoped to have ready answers for the first meeting on the rules and regulations for how to select and train men, and agents of other departments "engaged in the work of crime prevention and criminal law administration."<sup>404</sup>

Despite the clear goals of establishing a permanent presence and emphasizing crime prevention, the Advisory Committee still suffered ambiguity of purpose. Miller's determination to prioritize crime prevention was never in doubt, but even this took time to become explicit. A memorandum suggested possible cooperation with the International Association of Chiefs of

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<sup>396</sup> Memorandum for the Attorney General, 14 July 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (After Jan. 1, 1936).

<sup>397</sup> Announcement of Appointment of Advisory Committee, AGAC GC Box 1, Folder: Advisory Committee.

<sup>398</sup> "All the Delegates who attended the Attorney General's Crime Conference in Washington, December, 1934," AGAC AG Box 1, Folder: Advisory Committee.

<sup>399</sup> Scope of Activities, AGAC AG Box 1, Folder: Advisory Committee.

<sup>400</sup> "To Every Member of the Advisory Committee on Crime," AGAC AG Box 1, Folder: Advisory Committee.

<sup>401</sup> Memorandum for the Attorney General, 3 January 1935, AGAC GC, Box 1, Folder: Agenda.

<sup>402</sup> Members of the Attorney Generals Advisory Committee on Crime, AGAC GC Box 1, Folder: Advisory Committee.

<sup>403</sup> Memorandum to the Attorney General: Re: Crime Conference Matters, 3 January 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>404</sup> Memorandum to the Attorney General, Information. . . to the Advisory Committee, 21 January 1935, AGAC AG Box 1, Folder: Attorney General Memoranda (To January 1936).

Police or the National Committee on Prisons and Labor.<sup>405</sup> Maybe the American Bar Association could work with the Committee, Miller suggested to Cummings.<sup>406</sup> A sub-committee report in April suggested a range of activities, many of them geared toward producing more crime conferences, working toward institutional permanence, and maintaining public relations to encourage widespread approval of it all. One sub-item out of many was a charge to furnish “leadership in crime prevention” with a specific goal of “discovering the underlying factors in the delinquency of children.”<sup>407</sup> This seeming specificity would come to define the Advisory Committee’s most ambitious and therefore nebulous undertaking.

By May 1935 the Advisory Committee established its informational and institutional goals. Out of the Advisory Committee came a report on May 1, which outlined the main purposes. Other than general intentions to improve criminal law administration, achieve high scientific standards, and improve training, the report advanced two substantive aims—that the federal government provide “leadership” on crime prevention and that the Advisory Committee aim to solidify into a “permanent structure.”<sup>408</sup> And yet these two goals were not yet married. The top contenders for the permanent institution’s name were the “Federal Crime Institute,” the “Federal Institute of Criminal Justice,” and the “National Crime Institute.”<sup>409</sup>

If the drive for institutional permanence had yet to coincide fully with the crime prevention idea, it was less because of Miller’s and Cumming’s priorities and more a matter of political support. The Assistant Solicitor General Angus MacLean advised Cummings that although statutes had empowered the Attorney General leeway in creating bureaus—the Bureau of Investigation had arisen this way—authorization existed for the “detection and prosecution of crimes” rather than the “prevention of crimes.” He advised getting explicit authorization, which they proceeded to attempt.<sup>410</sup> Two versions of joint resolutions arose, and MacLean recommended the one that was vaguer.<sup>411</sup> Miller’s concern with information included a public relations effort to downplay the Justice Department’s ambitious aspirations. Press coverage raised a delicate issue, as the press had prematurely reported that Cummings had already created the bureau.<sup>412</sup>

Throughout 1935, Cummings’s Justice Department was the perfect venue for crime prevention. The Attorney General prioritized the idea almost as highly as Miller. Cummings saw a Federal Bureau of Crime Prevention as a way to “round out our structure” and an opportunity to “justify” the recommendations of both the Crime Conference and the Advisory Committee on

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<sup>405</sup> Memorandum in re: Conference on Methods of Crime Control, 4 January 1935, AGAC GC Box 1, Folder: Advisory Committee.

<sup>406</sup> Memorandum for the Attorney General, 21 January 1935, AGAC GC Box 1, Folder: Advisory Committee.

<sup>407</sup> Report on Sub-Committee on Plan and Scope of Attorney General’s Advisory Committee on Crime, 29 April 1935, AGAC GC Box 1, Folder: Advisory Committee.

<sup>408</sup> Report on the Attorney General’s Advisory Committee on Crime, 1 May 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

<sup>409</sup> Memorandum for the Attorney General, 2 May 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

<sup>410</sup> Memorandum for Mr. Godlen Bell, Memorandum for the Attorney General, 23 May 1935, Angus D MacLean, Assistant Solicitor General, in AGAC GC, Box 2, Folder: Crime Prevention.

<sup>411</sup> Memorandum for the Attorney General, 24 May 1935, AGAC GC, Box 2, Folder: Crime Prevention; Memorandum for Mr. MacLean, 24 May 1935, AGAC GC, Box 2, Folder: Crime Prevention; Department of Justice Appropriation Act 1936, Title II Pub No 22 74<sup>th</sup> Congress, AGAC GC, Box 2, Folder: Crime Prevention.

<sup>412</sup> Memorandum for the Attorney General, 25 June 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

Crime. For now, perhaps a bureau of Criminal Administrative Training and Information could arise.<sup>413</sup> And even if the crime prevention bureau could not gain institutional permanence, the Advisory Committee could serve the same function in the meantime.

### Homing in on Everything

In a way, the Advisory Committee's focus seemed modestly geared toward theory rather than practice. But the goal of collecting massive quantities of information about youth activities, family life, and the social conditions that bred criminality, while promoting the creation of a permanent clearing house of such information, had radical policy implications. At a minimum, Miller undertook to shift all the relevant centers of opinion toward a holistic approach that embraced systemic socio-economic reform in the name of the state's most basic functions of law and order. At its most capacious, Miller's conceptualization of crime prevention included any and all means used to combat crime, and thus did his worldview accommodate J. Edgar Hoover's FBI repression, even if Miller believed Hoover insufficiently recognized just how big the crime problem was. Even the narrower understanding of prevention as a question of juvenile delinquency, when pursued by the Advisory Committee, came to implicate family life and ultimately all of society, and entertained means of preemption as repressive as those embraced by Hoover.

Miller's grandiose intellectual undertaking hoped to obtain legitimation from academia, private institutions, and state and local governments, while also influencing them in the direction of crime prevention. In the summer of 1935, the Advisory Committee cast a very wide net—beyond organizations explicitly devoted to crime prevention or youth. The advisory sent out approximately 1,800 requests for any and all information about programs and approaches to crime prevention. These went to every conceivably relevant institution—state attorneys general and district attorneys, civic organizations and community chests, anti-vice and religious organizations, newspapers and libraries, chapters of the Boy Scouts and of the Young Women's Christian Association. Justin Miller solicited input from every conceivably relevant governmental unit, relaying Cummings's interest in "all government agencies whose functions might be construed as crime preventive." State and local children's bureaus and police units of course received letters. So did newly created federal agencies implicated in the welfare goal of crime prevention. Cummings and Miller wanted the insights of the Rural Research Unit of the Works Progress Administration, the Federal Housing Administration, and the Civilian Conservation Corps.<sup>414</sup>

Rather than only seeking inter-agency coordination, Miller's outreach campaign sought to build a "clearing house of information." The production of knowledge about crime prevention would require a broad, inductive search for what it could mean and therefore how to do it. While Miller relayed Cummings's hope of "securing the cooperation" of government agencies, to others Miller passed along Cummings's wish to "secure information" on "instructional and

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<sup>413</sup> Memorandum for Mr. Justin Miller, 21 December 1935, in AGAC GC, Box 2, Folder: Crime Prevention.

<sup>414</sup> Attorney General's Advisory on Crime Report, AGAC SF Box 1, Folder: Attorney General's Advisory Committee on Crime Report. John A. Pandiani notes that Roosevelt did not publicly acknowledge the CCC's crime prevention function until 1939, but insiders in the administration surely saw it in these terms. Pandiani, "The Crime Control Corps: An Invisible New Deal Program," *The British Journal of Sociology* 33, No. 3 (September 1982), 348–358, 352.

research work” implicating “Crime Prevention, Police Science and Criminal Law Administration generally.” Miller recognized the academic nature of his undertaking, identifying the particular relevancy of “law, political science, sociology, psychiatry, and several of the other medical and biological sciences, as well as physics and chemistry.”<sup>415</sup> A deluge of responses rewarded the effort. Juvenile aid bureaus, police training schools, child protective programs, youth work programs, Big Brother and Big Sister groups. Miller’s operations collected surveys of juvenile delinquency, enclosed publications, sociological studies, and stacks of bibliographies listing thousands of works of secondary literature.<sup>416</sup>

The Advisory Committee sifted through a vast collection of information, insights, and opinions, to understand the very contours of its own purpose. Working through the correspondence, Miller’s team had to conceptualize the scope of the problem and outlines for how to attack it. The more particular the Advisory Committee’s focus on preemption, especially among juvenile delinquents, the broader became its concern with the greater public welfare. Miller got encouragement in his posture that the wider its plan of attack, the better. R.K. Atkinson of the New York Police Department’s Crime Prevention Bureau had “only one suggestion” but it was more easily said than done. He believed “any plan on crime prevention must be a broadly conceived community approach” that mobilized both “social and recreational forces.”<sup>417</sup> E.L. Johnstone of the National Conference of Juvenile Agencies said a “national policy” alone could produce a “unified attack” necessary for crime prevention.<sup>418</sup> Miller’s outfit still wanted for specific proposals other than institutional permanence, yet settled on an emphasis on crime as both a national and diffuse problem.

The mutually reinforcing objectives, institutional and informational, could allow for the broadest of inquiry. Whatever its precise bureaucratic goals, by 1936 the Advisory Committee had pursued an epistemically capacious conception of crime prevention. Miller wanted reassurance that the bureaucratic scope should follow. In January he asked Cummings whether the Crime Prevention Bureau should undertake “crime prevention and criminal law administration generally” or only serve as an advisory board with a humbler charge.<sup>419</sup> Even with a modest institutional scope, he suggested the Advisory Committee could serve the ambitious intellectual cause by establishing a Chair of Criminology within the Library of Congress. An even humbler advisory role could justify the circulation of virtually any idea regarding crime—better use of radio technology, better harmonization of state and federal laws, more conversation among social agencies and groups like the chamber of commerce, and a devotion that officials themselves would follow the law, counted among the fronts on which the crime prevention battle would unfold. Sometimes the ideas of crime prevention were mixed with those of criminal law administration.<sup>420</sup> Focusing on juveniles as the best target for preventing crime, the Advisory Committee considered the open-ended question of what caused people to become criminals.

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<sup>415</sup> Miller to Atkinson, 14 June 1935, AGAC SF Box 3, Folder: Child Welfare; Miller to Big Brother & Big Sister Federation in NYC 1 July 1935, AGAC SF Box 3, Folder: Child Welfare.

<sup>416</sup> Attorney General’s Advisory on Crime Report, AGAC SF Box 1, Folder: Attorney General’s Advisory Committee on Crime Report; AGACC, Box 2: Folder: Bibliographies.

<sup>417</sup> R.K. Atkinson to Justin Miller, 27 June 1935, AGAC SF Box 3, Folder: Child Welfare.

<sup>418</sup> E.L. Johnstone to Miller, Sept 27, 1935, AGAC SF Box 3, Folder: Child Welfare.

<sup>419</sup> Memorandum for the Attorney General, 2 May 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

<sup>420</sup> Memorandum for the Attorney General, 20 August 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).



Miller amassed ideas from editorials, scientific journals, and institutions. The New Deal's broad epistemic approach accommodated every plausible explanation at least as a potential point of departure. The ultimate bureaucratic goal of institutional permanence remained the creation of a crime prevention bureau, which itself would have a capacious enough function as to justify a wide-reaching informational campaign in the interim.<sup>421</sup>

Miller's capacious understanding of crime prevention and the FBI's war on crime coexisted despite a difference in emphasis. Miller parted ways with J. Edgar Hoover, not on the need for either repression or prevention, but on their relative importance. He believed that Hoover's plan for training and professionalization was "a very good one." Miller wanted to go beyond the "hunting down and killing outlaws" and "severe programs of repression" that the public easily favored. He lamented that the people were uninformed about parole, probation, and prevention.<sup>422</sup> Miller likewise thought Congress underestimated the need for "educational and preventive work," but he also thought Congress undervalued the reform needed to guarantee "effective prosecution."<sup>423</sup> For Miller, there was no conflict between preventive and repressive means of control.

Miller did not see his and the FBI's methods as a zero-sum game. It would indeed be "idiotic" to try to "limit and restrict the activities of J. Edgar Hoover."<sup>424</sup> He maintained that "preventive and curative measures" could get the additional attention they deserved without depriving "proper emphasis to a rigorous program of detention, apprehension, prosecution and punishment."<sup>425</sup> Miller admired Hoover's "good work," but resented when he "steps out of his own field" to criticize others.<sup>426</sup> For example, Miller along with Sanford Bates did not agree with Hoover's wholesale attack on probation and parole.<sup>427</sup> But he also saw the difference in emphasis as a structural issue. The mobility of the Bureau precluded its active engagement in crime prevention.<sup>428</sup> Indeed, Miller believed Hoover undervalued not only prevention but traditional law enforcement machinery such as prisons. He lamented Hoover's "lack of knowledge" about "judges, prosecutors, probation officers, parole officers, prison administrations, jail administrators."<sup>429</sup> Miller recognized that prevention included enforcement, and not only by the Justice Department but in the Treasury department's taxation power, the Post

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<sup>421</sup> List of the "Fronts" of Crime Prevention, 11 July 1936, AGAC SF Box 1.

<sup>422</sup> Memorandum for the Attorney General, 14 July 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (After January 1, 1936).

<sup>423</sup> Miller to George T. Ragsdale, 19 November 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936); Memorandum for the Attorney General Cummings, 29 May 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>424</sup> To Louis S Cohane, 29 May 2 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>425</sup> Memorandum for the Attorney General, 6 December 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>426</sup> Memorandum for the Attorney General, 1 October 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>427</sup> Memorandum for the Attorney General, 3 June 1936 AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>428</sup> Memorandum for the Attorney General, 4 March 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1 1936).

<sup>429</sup> Memorandum for the Attorney General, 16 February 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1 1936).

Office Department's criminal cases, as well as the Children's Bureau work.<sup>430</sup> Respecting each other's functions and limits, Miller thought, would allow the optimal anti-crime strategy.

Always concerned with public relations, Miller did not care for the media's portrayal of a divergence between him and the FBI. He resented the press's sometimes "vicious antagonism against Mr. Hoover."<sup>431</sup> Rumors that the Justice Department planned to rid of Hoover irritated Cummings, and Miller similarly disliked the press's depiction of "a divided house" between the preventive posture of Miller and Bates and the unforgiving stance of Roosevelt, the Justice Department, and Bureau of Investigation. Roosevelt sided with Hoover in tightening the parole system.<sup>432</sup> Hoover encouraged Harry Lee to talk with Miller for a broader appreciation.<sup>433</sup> Miller reciprocated in respect for Hoover's place in the struggle against crime. Perfectly willing to share criticisms of Hoover with Cummings, Miller nevertheless protested when a reporter spun an encounter to depict Miller's crime prevention as at odds with the Justice Department's alleged deference to Hoover's war on crime.<sup>434</sup> He denied his reported complicity in the Probation Association's open criticism of Hoover, and reminded Cummings that he had "highly" commended the Bureau's work.<sup>435</sup>

In principle, Miller's broad conception of crime prevention not only included Hoover's tactics but virtually all subjects of crime control. But even when the Advisory collected information seemingly focused on understanding juvenile delinquency, it soon enough revealed itself to be ultimately interested in all aspects of society. The focus on youth easily meant a focus on families or more generally society. To foster favorable social conditions would require more governmental dedication to economic security. What seemed a promising alternative to repressive means of crime control easily became fixated on purity, open to eugenics, and as accommodating of punishment and discipline as the purely repressive approaches. The resistance Miller got to his fact-finding project revealed fissures in the transformative state of 1930s liberalism, more than any objection from Hoovers' conservative FBI.

The seemingly narrow focus on juvenile delinquency obscured the potentially endless breadth of the undertaking. As the Advisory Committee worked its way through its correspondence, Miller's team generated more proposals outlining how it would accomplish the goals. The Advisory Committee sought to understand the causes of crime, amassing editorials and publications that offered every plausible explanation. At the more capacious end of the definitional spectrum, conceptions of crime prevention saw the problem as societal, and therefore the solution was to be found in broad socio-economic reform. A common trope in the

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<sup>430</sup> Memorandum to the Attorney General, 3 January 1935, Re: Departmental organization for Crime Conference and Institute work, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1 1936).

<sup>431</sup> Memorandum for the Attorney General, 6 June 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1 1936).

<sup>432</sup> Cummings to Melvin J. Mass, 25 January 1937, Cummings Papers Box 114; Harry R Lee to Sanford Bates, July 1 1935 in AGAC GC, Box 2, Folder: Crime Prevention.

<sup>433</sup> Director to Harry R Lee, July 2 1935 in AGAC GC Box 2, Folder: Crime Prevention.

<sup>434</sup> Memorandum for Attorney General, 30 June 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>435</sup> Memorandum for Attorney General, 9 July 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

newspapers was that an apathetic or immoral population was at root the problem.<sup>436</sup> “Society” itself “Must Assume Blame,” concluded the *Pueblo Colorado Chieftain*.<sup>437</sup>

Editorials often blamed bad schooling. Leonard Power, a New York educator, identified weakening values in the school system.<sup>438</sup> The Jackson Mississippi News argued in June 1936 that if children had better education in “American heroes” like “Washington, Jefferson, Jackson [and] Lincoln,” there wouldn’t be such problems as the vigilante white supremacist group the “Black Legion crawling out from under planks.”<sup>439</sup> Hoover agreed with this emphasis and thought mass education had wrongly assumed an equality of intelligence among the youth.<sup>440</sup>

Ultimately economic security would give families the framework they needed to raise law-abiding children, and the Justice Department saw the problem in terms of common fairness and equity. Law enforcers often put the problem in economic terms—often given as a \$120 per capita price tag.<sup>441</sup> First Lady Eleanor Roosevelt also pointed to the economic costs of crime, which she estimated as “three times the annual cost of the Federal Government,” in her own 1935 speech urging Americans to see lawbreaking as a problem arising from social conditions.<sup>442</sup> By the end of Roosevelt’s first term, Cummings and Miller had corresponded with many social welfare organizations and shared such publications as “Social Aspects of Crime Prevention.”<sup>443</sup> They shared this emphasis with such progressive interlocutors as Wilhelm Keuhme of the Labor Alliance, who believed that aside from the few born “with a warped mind,” most criminals were economically desperate and that changing “economic conditions” could “rid the country of crime.”<sup>444</sup> Social welfare required security as much as vice versa. Bogdan Lukamski of the Social Welfare Protective Committee urged censorship against romantic portrayals of crime, federal command of the school system and media, authority consolidated under the governors and federal government. Combatting crime moreover meant pursuing rich and poor lawbreakers equally.<sup>445</sup> Cummings took to heart this need for social equality, passing along the words of Don Castle, former San Quentin inmate whose pamphlet “I Go to Prison,” emphasized systemic corruption and estimating that 75% of inmates were on the “side of right and justice,” even as “the big shots, and the politicians, lawyers and judges who protect and direct them” evaded justice.<sup>446</sup>

On the other hand, those claiming New Deal success in battling the Depression would cite falling crime numbers as evidence that “the economic as well as the moral condition” of America

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<sup>436</sup> “Apathy of public cited by Milligan as Ally of Crime,” *Kansas City Mo. Journal-Post*, 10 October 1936, AGAC SF Box 3 FOLDER: Causes of Crime; “greed and cruelty of individuals” and “Moral weakness probably stands next in the liest of causes,” *Portland Oregonian*, 20 June 1936, AGAC SF Box 3, Folder: Causes of Crime.

<sup>437</sup> “Crime Prevention,” *Pueblo Colorado Chieftain*, 31 March 1936, Editorial “Society Must Assume Blame.”

<sup>438</sup> “Crime, Poverty Called U.S. Peril,” *Philadelphia Ledger*, 26 March 1936,

<sup>439</sup> “A Job for Schools,” *Jackson Mississippi News*, 13 June 1936.

<sup>440</sup> *Paterson NJ News*, 23 March 1936.

<sup>441</sup> *Paterson NJ News*, 23 March 1936.

<sup>442</sup> Undated Speech, ERP Box 1403: Speech and Article File, 1935.

<sup>443</sup> Memorandum for the Attorney General, 19 November 1935, in AGAC GC Box 1, Folder: Attorney General Memoranda After Jan. 1, 1936; Memorandum for the Attorney General, 5 January 1937, in AGAC GC Box 1, Folder: Attorney General Memoranda after Jan. 1, 1936.

<sup>444</sup> Wilhelm Keuhme, Labor Alliance of America, to Homer Cummings, 27 December 1934, in AGAC SF Box 2, Folder: Crime Prevention.

<sup>445</sup> Bogdan J. Lukamski, Social Welfare Protective Committee, to Cummings, 15 December 1934, in AGAC SF Box 2, Folder: Crime Prevention.

<sup>446</sup> Don Castle to Cummings, 15 December 1934, in AGAC SF Box 2, Folder: Crime Prevention.

was improving.<sup>447</sup> The view that bad economic conditions bred crime could moreover carry regressive implications. Sympathy for the needy could translate into reaction against those deemed unworthy. Socio-economic reformism often expressed itself in a paternalistic outlook on families.<sup>448</sup> Looking to youth as the critical period, many editorials stressed family dysfunction.<sup>449</sup> Officials in the International Association of Chiefs of Police took up a preventive approach, focused on youth, that often blamed parents.<sup>450</sup> A judge in New Jersey lashed out against parental incompetence.<sup>451</sup> A New York crime prevention conference emphasized “the indulgence of the home” as a breeding ground for criminality.<sup>452</sup> Parents poorly disciplined their kids and “glorify[ed]” outlaws.<sup>453</sup>

The idea that that pure youth were corrupted by a bad environment served J. Edgar Hoover’s conservatism as well as it captured Miller’s progressivism. In June 1936, the FBI chief told a New York Round Table Forum that many crimes should be charged to the parents of the lawbreakers.<sup>454</sup> “[C]rime begins at home,” Hoover told an audience, lamenting that “we are doing nothing—to protect that home.” He averred that youth too young to vote accounted for 20% of crimes. Parents’ lax discipline explained how “children” could commit nearly a thousand murders and tens of thousands of burglaries and larcenies annually.<sup>455</sup> Crime prevention at its most progressive could become fixated on stamping out impurity, or isolating it. Herbert Williams of the Big Brother & Sister Federation looked for environmental causes argued that sexual deviancy was one such impurity toward which youth were naturally hostile. “A boy who is thrown in contact with companions engaging in sex perversions is at first horrified and then gradually develops matter of fact attitudes toward the practice and later begins to indulge in it” The focus on the rehabilitative potential of youth could render those older a lost cause. Most “confirmed criminals” were “incurable,” according to a “composite picture” of criminality created by Kansas City police, who believed that those under seventeen had much more chance of being saved.<sup>456</sup>

The focus on youthful purity carried gendered and racial implications that reflected changing criminological attitudes toward demographics. One woman delegate for social agencies believed that crime prevention required more places for “wholesome recreation” for African-American girls.<sup>457</sup> Sex work, on the other hand, should be seen as a “social rather than criminal question.”<sup>458</sup> But attitudes were in transition. Contrasted with earlier notions that saw foreigners as especially criminal, Professor William Ogburn at the University of Chicago spoke for others

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<sup>447</sup> *Bismarck N.D. Tribune*, 4 June 1936.

<sup>448</sup> Various clippings filed under “Poverty and Delinquency,” AGAC SF Box 3, Folder: Causes of Crime.

<sup>449</sup> “Youth’s Problem Today Y Forum Debate Topic,” *Waterbury Conn Republican*, 21 March 1935,

<sup>450</sup> “Criminals Are Vain, Police Chiefs Say; Broken Homes Figure in Breeding Them” *New York Times* 24 September 36; “Criminals Are Vain, Police Chiefs Say; Broken Homes Figure in Breeding Them,” *New York Times* 24 September 1936.

<sup>451</sup> *Paterson NJ Call*, 25 May 1936.

<sup>452</sup> *Utica N.Y. Dispatch*, 22 March 1936.

<sup>453</sup> *Jackson Mississippi Citizen–Patriot*, 39 May 1936.

<sup>454</sup> *Helena Mont Independent*, 29 May 1936.

<sup>455</sup> *Scranton PA Times*, 5 May 1936.

<sup>456</sup> Herbert D. Williams, “Causes of Social Maladjustment in Children,” *Psychological Monographs* 43, No 1 (1932): 276–300, 293; “Portrait of a Criminal” *Philadelphia Ledger*, 2 October 1936,

<sup>457</sup> “Crime Prevention,” Social Agencies Weigh Causes, Cure for Crime, *East St Louis Journal*, 4 March 1936.

<sup>458</sup> “The Control of Crime: Women Are Social Problems” *San Francisco Chronicle*, 28 August 1935.

in arguing that foreigners committed less crime.<sup>459</sup> Whereas earlier eugenic approaches sought to categorize people neatly along deterministic lines, in the age of crime prevention all youth were seen at risk. A midwestern survey by Herbert D. Williams indicated that the problem transcended typical eugenic categories. Boys prone to delinquency ranged in intelligence from “feeble-minded to near genius,” although he was willing to distinguish gendered patterns. Troubled girls were “more interested in sex” and more “over-developed physically” than their male counterparts, who were in turn “more resistant to authority.”<sup>460</sup>

The retreat from demographic determinism was starkly apparent in Miller’s somewhat nuanced, environmentalist version of eugenics. Miller’s 1930 article “Does Prolific Breeding Cause Crime” saw birth control as a preventive strike against abortion and the “closely related offense. . . of child murder.”<sup>461</sup> Miller’s team also filed under “eugenics” an article by Lorine Prutte drawing parallels between crime rates under alcohol and abortion prohibition.<sup>462</sup> Miller’s correspondent Stella Hanau, the Educational Director of the National Committee on Federal Legislation for Birth Control, said her organization’s “attitude” of “crime prevention” could best be found in a Margaret Sanger “open letter” that attributed crime to “over-sized families.”<sup>463</sup>

Miller’s environmentalist eugenics contrasted with the determinist views going out of fashion. He had given a critique to Marian Winters, whose manuscript “The Biological Aspects of Crime” had perhaps betrayed an imbalanced view on racial disparity in its errors. Winters conceded the correction: “there are 8 times more male Negro murderers, whereas it should read Negroes murdered.” The original draft also wrongly described American immigration policy as open before World War I, when in fact “certain classes of defectives” had been excluded. (Winters did not offer a correction to acknowledge East Asian exclusion.) Even more than Miller, Winters believed that although other factors drove crime, “a fanatical environmentalism” distracted people from “man’s inherent quality.”<sup>464</sup>

Miller’s views on eugenics were not yet unfashionable, and indeed enjoyed widespread affirmation in policy. Thirty states had some form of sterilization law, seventeen of them for convicted criminals.<sup>465</sup> Miller asked E.S. Gosney of the Human Betterment Foundation for information on sterilization. As a charter member of the organization, Miller already knew, according to Gosney, that the group focused on “sterilization of the unfit.” Gosney had “no doubt that the sterilization of the feeble-minded and mentally diseased” would significantly reduce the number of criminals in America and internationally. Gosney also identified the promising use of “voluntary” sterilization in such prisons as San Quentin, conceding that although “some

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<sup>459</sup> “Native Criminals vs Foreign,” *Augusta GA Herald*, 31 August 1935.

<sup>460</sup> “Crime Prevention Objectives,” *Journal of Criminal Law and Criminology* (1931–1951), Vol. 27, No. 2 (Jul. – Aug., 1936), 289–290; Herbert D. Williams, “A Survey of Pre-Delinquent Children in the Mid Western Cities,” Big Brother and Sister Federation, 1933.

<sup>461</sup> Justin Miller, “Does Prolific Breeding Cause Crime?” *Birth Control*, April 1930, 105.

<sup>462</sup> Lorine Prutte, PhD, “The Abortion Racket and Its Social Costs.” *Physical Culture*, July 1936. Prutte argues that just as prohibition of alcohol intensified crime, the prohibition of abortion causes similar problems. The paper is organized under eugenics. AGAC SF Box 6, Folder: Eugenics.

<sup>463</sup> Educational Director Stella Hanau (National Committee on Federal Legislation for Birth Control) 22 November 1935, AGAC SF Box 6, Folder: Eugenics. “Our attitude on the subject” of “crime prevention” is set forth in the Margaret Sanger Open Letter from New Jersey Crime Conference. Margaret Sanger, 5 March 1935: “Open Letter from Margaret Sanger”: discussing “very real connection between birth control and crime” and “over-sized families.”

<sup>464</sup> Marian Winters to Miller, 10 April 1936, AGAC SF Box 3, Folder: Causes of Crime (2).

<sup>465</sup> “Sterilization laws,” AGAC SF Box 22, Folder: Sterilization.

question” might exist as to the “advisability of sterilization of criminals under compulsion,” the “voluntary” sterilization of inmates had no informed opposition except in the Catholic Church.<sup>466</sup> Although Miller’s brand of environmentalist eugenics would eventually fall out of favor, it proved useful at the time for networking with advocates and legal regimes throughout America.

New Deal crime prevention consistently strived for academic corroboration in pursuit of both rigor and legitimacy.<sup>467</sup> Recognizing the need to professionalize criminal justice officials, Miller’s team considered that the Bureau of Education could handle training schools.<sup>468</sup> But Miller’s team thought it clear that formal academia needed more engagement.<sup>469</sup> The Bureau of Investigation’s incapacity to meet demand for training highlighted the need for university involvement. Northwestern had specialized in criminological training and published the *Journal of Criminal Law and Criminology*, and Harvard and the University of California engaged in serious criminological study.<sup>470</sup> The Crime Prevention Bureau could help set up such classes and course curricula.<sup>471</sup>

The involvement of academia only reinforced the more repressive aspects of both Miller’s criminological thought and Hoover’s war on crime. From Harvard, the Gluecks’ name would be floated and included in several of the most prominent ideas of organizing around prevention, and Miller saw it as a selling point.<sup>472</sup> Sheldon Glueck’s talk on a national “Plan for Crime Prevention” made the rounds from R.C. Sheldon to Miller.<sup>473</sup> Although the Advisory Committee kept a file on the Gluecks, it would be too much to say the Gluecks defined criminological thought for the New Deal. They nevertheless stood out as a sophisticated exposition of New Deal era liberal criminology. The Gluecks, like Miller, did not prioritize repression. They wanted to isolate children from correctional institutions until “more scientific and sympathetic efforts have failed.” Like the New Dealers on questions of political economy, they believed in a “skeptical eclecticism and experimental attitude.” They saw economic and social planning as the key to it all.<sup>474</sup> The central state would need a greater role, and Sheldon Glueck’s criticism of lack of federal coordination would continue in the background of the federal crime prevention deliberation.<sup>475</sup>

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<sup>466</sup> Miller to E.S. Gosney, 6 December 1935; Gosney to Miller, 16 November 1935. AGAC SF Box 6, Folder: Eugenics.

<sup>467</sup> Memo for the Attorney General, 21 February 1936, AGAC GC Box 1, Folder: Attorney General Memoranda After Jan. 1, 1936.

<sup>468</sup> Memorandum for the Attorney General, 7 April 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (After January 1936).

<sup>469</sup> Memorandum for the Attorney General 4 November 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (To January 1936).

<sup>470</sup> Memorandum for the Attorney General, 6 January 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>471</sup> Memorandum for the Attorney General, 28 May 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>472</sup> Jane Chandler to Mr Miller, 5 December 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>473</sup> R.C. Sheldon to Justin Miller, 9 March 1936, in AGAC SF, Box 3, Folder: Child Welfare.

<sup>474</sup> Sheldon and Eleanor Glueck, *Preventing Crime*, Ch. I: Introduction—Philosophy and Principles of Crime Prevention, in in AGAC SF Box 7, Folder: Glueck.

<sup>475</sup> “Harvard Law Teacher, in Talk Before Social Agencies’ Conference, Scores Lack of Co-Operation in U.S.,” *Post*, 16 April 1937, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and

In the most sophisticated exposition of Miller's approach, the Gluecks advocated the broad targeting of socio-economic conditions through the welfare state, and willing to surgically strike problem families through eugenic means. Sheldon Glueck envisaged an enlarged mission and vision of crime prevention, properly undertaken by groups like the Big Brother & Sister Federation. Consistent with Miller's vision, Glueck saw crime prevention as "any technique which seems reasonable in the light of known facts and the suggestions of various authorities in the fields of criminology, mental hygiene, social work."<sup>476</sup>

At the 1935 annual meeting of the Big Brother and Big Sister Federation, Sheldon Glueck outlined his vision—national, scientific, holistic, and eugenic. He listed the many social organizations implicated in his crime prevention program, called for a Federal Crime Prevention Bureau, and stressed the central principle of economic justice.<sup>477</sup> He argued that the nation-state should promote a "voluntary sterilization law" for every jurisdiction. But Glueck's approach to eugenics, much like Miller's, was environmentalist. He explained that a "substantial percentage" of criminals had "mentally defective" or "diseased" family members, and had suffered "erratic"—either "too lax or unduly repressive"—discipline as children. Poverty and criminality both became "tribal traditions" in families, which suffered unclear homes in bad neighborhoods. Children would express their sexuality unhealthily. Bad economics undergirded bad social conditions, which literally bred bad behavior. So sterilization was hardly a panacea. The struggle against crime required a "systematic, continuous attack on all fronts of biological pathology." The school, the community, the home, the welfare office, and all social institutions would have to wage a preventive war on such dysfunction. Municipalities needed more engagement. The federal government would need to expand its role to secure economic justice, help the underprivileged, and produce a crime prevention bureau to serve as a "clearing-house and service-station" for local efforts.<sup>478</sup>

But as much as he stressed socio-economic conditions, Glueck also emphasized the more general need for state-guaranteed security. Not all crime was economic, and therefore not all of it could be remedied. Glueck believed even better economic policy would allow some crime, for on one extreme some were "so organized innately that disciplined life in society" was too difficult; for others, even some of "excellent biologic heritage," crime was a deliberate choice. But most fell between these extremes. Economic depression produced criminality, and short of a total abolition of capitalism, "ample scope" existed for a "fairer distribution of the joint product of capital" to greatly lessen criminality. A "radical change of attitude" would allow the optimal economic policy, avoiding the totalitarianism of tyrannies abroad and preempting domestic extremism—stemming the effects of "deleterious commercialized amusements," "limitless greed" and "lawless and unjust" competition, combating the "excessive addiction to the drug of

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Crime Prevention, 1937–40, Parole and Crime Prevention, 1936–1938. The news clipping was shared with the comment, "This clipping is rather in line."

<sup>476</sup> Sheldon Glueck to R.C. Sheldon, Big Brother & Sister Federation, 11 September 1935, Sheldon Glueck to R.C. Sheldon, Big Brother & Sister Federation, 11 September 1935—AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>477</sup> Sheldon Glueck, "Crime Prevention," Address at Annual Meeting of Big Brother and Sister Federation, Inc., 15 April 1935, AGAC SF, Box 7, Folder: Glueck.

<sup>478</sup> Sheldon Glueck, "Crime Prevention," Address at Annual Meeting of Big Brother and Sister Federation, Inc., 15 April 1935, AGAC SF, Box 7, Folder: Glueck.

wealth.” The key to law and order was security—“security against unemployment, sickness, old age and other hazards, by means of social insurance.” Social security would stop lawlessness.<sup>479</sup>

Cummings and Miller saw another venerable ally in August Vollmer. Cummings alerted the entire Advisory Committee when Vollmer was in town in April 1935, and thought it important to discuss the plan with him.<sup>480</sup> Miller prioritized the meeting, seeing Vollmer as “perhaps[] the outstanding police chief in the United States.”<sup>481</sup> They shared a vision. Vollmer, a New Deal Democrat, advocated public works projects to both modernize law enforcement and to cure the Depression. To combat unemployment he suggested hiring “a quarter of a million” college graduates annually to conduct a “study of the cost of crime and of dependency” and thought half a million might study traffic conditions, a proposal he admitted was not “well-thought-out.”<sup>482</sup> Vollmer admired the Tennessee Valley Authority’s creation of a police department from scratch as “the nearest approach to a first class organization.”<sup>483</sup> He believed that, in 1936 more than ever, America needed “an institute of criminology.” Everyone wanted to know what to do, seeking information, and “it is obvious that they should turn to Washington for the answer.”<sup>484</sup> Vollmer not only agreed with Cummings and Miller; he greatly admired J. Edgar Hoover, with whom he worked on fingerprinting and nationalization proposals through the 1920s and 1930s, and whose vision of a “war on crime” Vollmer personally praised, calling Hoover’s FBI America’s “first. . . police organization” to work “efficiently and honestly.”<sup>485</sup> A practitioner and theorist, and enforcer and reformer, Vollmer embodied the ecumenical New Deal ethos of prevention and repression.

Not only did federal officials seek academic validation; private institutions attempted to build bridges with the Justice Department through their legitimacy, as if to prove Miller’s point about Cummings’s discursive leadership. R.C. Sheldon from the Big Brother & Sister Foundation proposed a “Crime Prevention Institute” to include such luminaries as Miller, Hoover, and Bates, Glueck and Miriam Van Waters, August Vollmer, and Edwin Sutherland.<sup>486</sup> R.C. Sheldon even claimed Sheldon Glueck had signed on as president, which Glueck denied.<sup>487</sup> The Institute put out a statement stressing the “social and personal conditions involving a vast range of knowledge,” rendering its first duty—much like that of Miller’s outfit—to “act as a clearing

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<sup>479</sup> Sheldon Glueck, “Crime Prevention,” Address at Annual Meeting of Big Brother and Sister Federation, Inc., 15 April 1935, AGAC SF, Box 7, Folder: Glueck.

<sup>480</sup> Memorandum for All members of Advisory Committee in Department, 10 April 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>481</sup> Memorandum for the Attorney General, 10 April 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>482</sup> Vollmer to Lt. L.B. Stanton, 1 September 1933, AVP Box 42; Vollmer to George F. Zook, 10 May 1934, AVP Box 43.

<sup>483</sup> Vollmer to Kenneth Rouse, 28 November 1934, AVP Box 43.

<sup>484</sup> Vollmer to Miller, 24 February 1936, AGACGC Box 2, Folder: Crime Prevention.

<sup>485</sup> See the following letters from J. E. Hoover to Vollmer: 13 April 1926; 6 March 1925; 5 August 1925; 10 September 1925; 20 April 1926; 2 October 1930; 23 January 1931; 23 April 1931; 19 March 1932; 8 July 1932; all in BCPD Box 14: Folder, Federal Bureau of Investigation. Also see Vollmer to Hoover, 24 August 1934, AVP Box 43.

<sup>486</sup> Sheldon Glueck to R.C. Sheldon, Big Brother & Sister Federation, 11 September 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>487</sup> Memorandum for the Attorney General, June 24 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).



house of crime prevention information.”<sup>488</sup> Miller wondered if they should send a letter to the National Crime Prevention Institute, and Cummings discouraged Hoover, Bates, and Miller from joining the boards for private crime prevention organizations, thus incurring liability for these organizations’ “conduct, attitude and activities.”<sup>489</sup>

The Justice Department strove to collaborate with civic institutions without appearing to endorse their activities. Miller considered informing the National Crime Prevention Institute that they would not officially join.<sup>490</sup> But, in a show of trans-jurisdictional trust, Cummings did leave open the possibility of endorsement when state and municipalities did so first.<sup>491</sup> Private institutions, for their part, supported the Justice Department’s drive to build a Crime Prevention Bureau. The Council of the Section on Criminal Law resolved to ask Congress to extend Justice’s activities.<sup>492</sup> The Chamber of Commerce also rallied behind the Justice Department’s expansion of activities.<sup>493</sup>

The ideological project of crime prevention translated into a political bias in efforts at coordination with state and local governments. Crime prevention allowed productive coordination with localities. On behalf of all the major cities, U.S. Conference of Mayors Daniel Hoan offered assistance, at which point Cummings approved his inclusion in the committee.<sup>494</sup> Miller’s team respected how seriously Hoan took crime prevention.<sup>495</sup> Miller also approved of New York Governor Herbert Lehman’s “very active” work for “Crime reform programs,” and wondered if he should give his support or even more substantive assistance.<sup>496</sup> The Advisory saw an ally in California’s Earl Warren, a Republican whom Miller said had “sound judgment and long experience” on crime prevention.<sup>497</sup> While in principle crime prevention transcended partisanship, the Democrats enjoyed the windfall of its branding under New Deal criminology.

In the end, Justin Miller’s capacious ideas of crime prevention were a double-edged sword. Breadth of vision meant wide appeal but also made focus elusive. Crime Prevention Conferences became common.<sup>498</sup> Regional events could link the national to the local. The societal

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<sup>488</sup> “Crime Prevention Objectives,” *Journal of Criminal Law and Criminology* 27, No. 2 (Jul. – Aug., 1936), 289–290.

<sup>489</sup> Memorandum for the Attorney General, 25 Feb 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>490</sup> Memorandum for the Attorney General, 25 February 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>491</sup> Cummings to Hoover, Bates, and Miller, 4 November 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>492</sup> Memorandum for the Attorney General, 6 May 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>493</sup> Memorandum for the Attorney General, 9 September 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>494</sup> Memorandum for the Attorney General, 14 February 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936); Paul V Betters to Cummings, 8 February 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936); Cummings to Daniel W Hoan, 14 February 1935 AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>495</sup> Daniel W. Hoan, “Crime Prevention,” United States Conference of Mayors, 1936.

<sup>496</sup> Memorandum for Mr. Suydam, 13 Jan 1936 AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>497</sup> Memorandum for the Attorney General, 24 October 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>498</sup> “A Plan for the Crime Prevention Conferences,” AGAC SF Box 5, Folder: Crime Prevention.

implications spurred optimism. Miller hoped that “a more wholesome background of public opinion” was moving beyond “repressive phases of crime control” to embrace a “well-rounded program.”<sup>499</sup> And yet with the emphasis on information and knowledge, federal crime prevention struggled to be more than a discursive exercise. As Prison Bureau chief Sanford Bates said in 1937 at a typical regional convening, “It is one thing to admit the importance of crime prevention, but a far more difficult thing to do something about it.”<sup>500</sup> They mulled over the possibility of more crime conferences.<sup>501</sup> Conversations about conversations seemed to produce more conversations about conversations.

Miller’s broad vision ultimately exposed internal tensions in its socially conscious liberalism and economic justification, and threatened to subsume the most repressive instruments of crime control. For Miller, liberalism could and should embrace both social activism and federal police power, but not all activists and reformers agreed. ACLU Director Roger Baldwin forcefully rebuked Miller’s outreach project, insisting his organization had “not much to offer” for the study. The ACLU, to the contrary, focused on “crime by those who are supposed to uphold law and order.” Reining in lawless law enforcement to provide a better role model would best serve the ACLU’s “conception of crime prevention.”<sup>502</sup> Miller attempted to reconcile the response to his own philosophy of law and order, conceding that “official lawlessness” complicated efforts for police “reorganization” and insisting the ACLU’s mission was, contrary to Baldwin’s protests, “definitely crime preventive.”<sup>503</sup> Miller’s attempts at reconciliation, the progressive esthetic of New Deal criminology did not win over everyone on the left, some of whom found danger in the societal ambition of the project.

The push-back against Miller’s emphasis also came from other places. Many wished to avoid the mere association with questions of criminality. Lester F. Scott of the Campfire Girls insisted that her organization did not “claim to prevent crime,” seeing as how doubtful it was that many of its members were “potential criminals.”<sup>504</sup> Girl Scouts National Director Josephene Schain apologized to Miller for not being of much help.<sup>505</sup> In some cases, Miller pushed back against those correspondents unsure how they could help. He insisted to Brackin Kirland of Boys Club that “your work fits in very nice with the Attorney General’s larger program of crime prevention and control.”<sup>506</sup> Miller was eager to downplay the dissent, to portray crime prevention as uncontroversial.

By the late 1930s, the ambition of crime prevention proved its greatest vulnerability. The expansive breadth threatened to undercut its own economic explanation for crime. As crime fell in the midst of Depression, poverty had limited explanatory power. Glueck was not the only crime prevention enthusiast to question the importance of economics. Others stressed that some

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<sup>499</sup> Memorandum for the Attorney General, 19 October 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>500</sup> Summary of Crime Prevention Conference of the Council of Social Agencies, Buffalo New York 1937, AGAC SF Box 5, Folder: Crime Prevention.

<sup>501</sup> Memorandum for Mr. Miller, 7 November 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (After Jan. 1, 1936).

<sup>502</sup> Roger Baldwin to Miller, 17 March 1936, AGAC SF Box 4, Folder: civil liberties.

<sup>503</sup> Miller to Baldwin, 25 March 1936, AGA SF Box 4, Folder: civil liberties.

<sup>504</sup> Lester F. Scott to Justin Miller, 30 July 1935, AGAC SF Box 3, Folder: Child Welfare

<sup>505</sup> Josephene Schain, National Director of Girl Scouts, AGAC SF Box 3, Folder: Child Welfare.

<sup>506</sup> Miller to Brackin Kirland, Boys Club, 11 April 1936: AGA SF Box 3, Folder: Child Welfare.

criminals left decent work to steal.<sup>507</sup> An editorial in the *Miami Herald* concluded that poverty was not to blame.<sup>508</sup> Some shifted blame away from unemployment, insisting that a young criminal stealing out of “dire need” is understandable but not the main problem.<sup>509</sup> Ultimately, however, the greatest test for the limits of crime control came in the effort to bring punishment under the umbrella of welfare.

### Utopian Visions, Welfare, and Penology

Federal crime prevention rose as a project of grand intellectual and institutional ambition and receded as the idea outpaced the institutions. As crime prevention went beyond preventing delinquency, it came to include a more effective means of penal control. While most discussion of prevention still focused on “the work of juvenile courts and other children’s agencies,” Miller stressed the “need for research work in connection with major crimes committed by adults” and used the analogy of “disease prevention.”<sup>510</sup> Academic literature had bolstered the connection.<sup>511</sup> Involuntary psychiatric commitment had long fused crime prevention to detention.<sup>512</sup> Some argued that criminal correctional systems, in their rehabilitative function, qualified as part of prevention.<sup>513</sup> Indeed, Roosevelt’s prison officials including Sanford Bates were among the most supportive of crime prevention.<sup>514</sup> The rhetoric of New Deal liberalism already populated carceral legislation. HR 9147 sought “to provide for the general welfare” through “federal aid to the states” for “adequate institutional treatment of prisoners” and “improved methods of supervision.” By the late 1930s, the penal system was seen not as an opposing approach to crime prevention, but one of its core institutions.<sup>515</sup> Ideally, coordination would bring together all the key federal prison authorities—the Federal Bureau of Prison, the Prison Industries Reorganization Administration, and the state level officials who constituted the Interstate Prison Commission—behind the cause of prevention.<sup>516</sup>

In its new aspirations toward penology as well as its more general intellectual ambition, crime prevention finally became an idea too big for its institutional platforms. Crime prevention succumbed to its unraveling not in the Justice Department, but in the Treasury, where it became even more theoretical, even more ambitious, and even more devoted to the concept of crime

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<sup>507</sup> “Educated Crook Hits Crime Theory,” *Denver Post*, 14 April 1936.

<sup>508</sup> “Poverty not the blame,” *Miami Herald*, 18 August 1936.

<sup>509</sup> *Union City NJ Dispatch*, 10 June 1936.

<sup>510</sup> Memorandum for the Attorney General, 30 March 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>511</sup> John Ryan, *Crime Prevention: Correction Department Officers Should be Assigned to Work with Police Squad, Combined Force Would prevent Many Crimes* (1932), indexed in *Bibliography of Crime and Criminal Justice, 1932–1937*, compiled by Dorothy Campbell Culver, Bureau of Public Administration, University of California (New York: The H.W. Wilson Company, 1939), 333.

<sup>512</sup> Max Schlepp, “A Plan for the Reduction of Criminality,” *National Municipal Review* v. 15 (Sept 1924).

<sup>513</sup> Herman Adler, “The Prevention of Crime,” *Journal of Criminal Law and Criminology* 23, No. 1 (May – Jun., 1932): 81–84.

<sup>514</sup> See, for example, Sanford Bates, “The Next One Hundred Years in Probation: Progress is Being Made,” delivered at the National Probation Association Annual Conference, 31 May 1941, in *Vital Speeches of the Day* 7, Issue 20: 625–627.

<sup>515</sup> James V. Bennett, *The American County Jail and its Future in a Crime Prevention Program* (Osborne Association News Bulletin, June 1939).

<sup>516</sup> List of the “Fronts” of Crime Prevention, 11 July 1936, AGAC SF Box 3.

control as an undertaking of both social welfare and security.<sup>517</sup> In 1935, under authority of the Social Security Act, Roosevelt formed the Interdepartmental Committee to Coordinate Health and Welfare Activities. Assistant Secretary of the Treasury Josephine Roche headed this ambitious program to transcend bureaucratic boundaries in order to attack America's many social problems.<sup>518</sup> Among its many units was a more focused Technical Committee on Probation, Parole, and Crime Prevention—as it would finally be called. Its membership profile at the time of its final report in 1938 reflected social welfare priorities better than the more law-and-order makeup of the Advisory Committee. Frank Bane was executive director of the Social Security Board. John Studebaker was Commissioner of Education. Mary Hayes hailed from the National Youth Administration. The Works Progress Administration sent Irma Ringe. Katharine Lenroot came from the Children's Bureau. Robert Fechner was Director of the CCC. The welfare state representatives worked alongside law and order brass. Gustav Peck represented the Prison Industries Reorganization Administration, Robert Beattie came from the Administration of Criminal Statistics at the Census Bureau, and Attorney General's Special Assistant Brian McMahon also participated. Wayne Morse directed the Attorney General's Survey of Release Procedures. Richard Chappell supervised the Federal Parole System. F. Lovell Bixby represented the Bureau of Prisons. Many facets of the New Deal state were now well represented in a progressive undertaking of crime control—a task earlier liberals would have found unthinkable in the Department of Treasury—but the most radical ideas would prove a bridge too far.

The Technical Committee's work, dominated by a smaller subset of its members, managed to produce an increasingly radical vision. The vanguardism of this approach ran into problems of institutional jealousy, but the policy stakes at that point were low. While a particularly radical formulation of crime prevention, it did not deviate from Cummings's broad vision until the moment that it actually advocated a specific, substantive, and provocative proposal—one that threatened the institutional power of the Justice Department but would have also paved the way for a more carceral form of American welfarism.

Despite the impressive multi-departmental personnel list, the technical committee was in fact dominated by a few personalities, particularly Miller and Helen Fuller. The two of them secured a continuity of purpose from the Advisory Committee to the Technical Committee.<sup>519</sup> Over time, Miller had put Helen Fuller in charge of the information clearing house. In the fall of 1935, Fuller from the public lands division to was assigned to Miller.<sup>520</sup> Miller put Fuller to work in the surveying of crime prevention strategies, researching “all forms of recreational, vocational and

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<sup>517</sup> For the standard theoretical discussion of punishment and welfare in the British context see David Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower Publishing, 1985).

<sup>518</sup> Franklin D. Roosevelt, “Announcement of the Appointment of Interdepartmental Committee for Coordination of Federal Health Activities,” 15 August 1935, APP UCSB. Robyn Muncy discusses Roche's role in the Interdepartmental Committee, but not on crime prevention, in *Relentless Reformer: Josephine Roche and Progressivism in Twentieth-Century America* (Princeton: Princeton University Press, 2014).

<sup>519</sup> Membership, Financial Committee on Probation, Parole and Crime Prevention; Technical Committee on Probation and Crime Prevention: Membership of Working Subcommittee; Technical Committee on Probation and Crime Prevention: Membership of the Full Committee, PICCHWA Box 43: Vol III.

<sup>520</sup> Memorandum for the Attorney General, 23 October 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

other activities designed to discover and eliminate the cause of crime.”<sup>521</sup> Fuller outlined the list of crime prevention activities. They included preventive police work, training, juvenile courts, coordinating councils, community councils, recreational and leisure programs including the Works Progress Administration, the Public Works Administration, the National Youth Administration, the Boy Scouts, crime commissions, religious activities, Education, Health, Demonstration Projects and research.<sup>522</sup> By October 1936, Fuller was working with Miller every day.<sup>523</sup>

On April 15, 1937, Miller, serving as chair, opened the first meeting of the Technical Committee with some opening thoughts on practice and theory. There existed concrete models for this new interdepartmental study of crime prevention and probation. Miller mentioned a couple specific examples—the Civilian Conservation Corps’ employment of young men, surely a crime preventive undertaking—and police interdiction of marijuana, now a more promising enterprise than the attempt at regulating liquor. But even as the war on crime showed general progress, Miller worried that crime failed to abate. He suggested a broad approach to crime prevention that emphasized adult probation and community engagement, and offered three new avenues of action—consolidation of a new department, more coordination, and, vaguely, more attention to what was being neglected in public order.<sup>524</sup>

Miller’s theoretical, even ponderous, discussion of the gathering’s purpose not only pointed to a nebulously broad vision; he raised a concern that the very idea of crime prevention was burdened by negativity. The lexicon failed to offer a term, Miller lamented, that meant the prevention of crime but assumed the absence of crime as the natural order of things. He wished for a positive term, analogous to “public order” or “public health”—phrases that did not emphasize the *prevention* of the undesirable, but rather the maintenance of the desirable. Miller wanted a program against crime that connoted the opposite of crime without mentioning it. As optimistic a project as crime prevention was, he wanted to purge the very signifier of the social problem he sought to prevent. A social engineering campaign of tremendous ambition deserved a comparably bold feat of reconceptualization.<sup>525</sup>

The meeting echoed the general New Deal ethos—that battling crime was a public welfare issue, because perhaps nothing disturbed the public welfare more than crime. But the rest of the committee meeting mused over practical problems. There was suboptimal coordination between the federal government and states on probation. Federal crime prevention coordination was especially limited in the South. The CCC had shortsightedly excluded parolees and youth on probation. Ringe argued that including the WPA’s work on recreation, music, and art as examples of crime prevention dangerously understated the problem of crime. The Public Health

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<sup>521</sup> Memorandum for the Attorney General, 7 April 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>522</sup> Memorandum for Mr. Miller (from Fuller) 20 May 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>523</sup> Memorandum for the Attorney General, 28 October 1936, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>524</sup> Conference of Technical Committee on Probation and Crime Prevention, 15 April 1937, PICCHWA Box 43: Vol III.

<sup>525</sup> Conference of Technical Committee on Probation and Crime Prevention, 15 April 1937, PICCHWA Box 43: Vol III..

Service and Prison Bureau needed to work together.<sup>526</sup> The governmental infrastructure would need to catch up with the theoretical ambitions of the project.

At the meeting it was decided to create a subcommittee to produce a report. Even before the meeting, Miller envisioned a smaller subcommittee to do much of the work.<sup>527</sup> The subcommittee, chaired by Miller, would consider coordination between the different levels of government, review reports, and suggest better organization, including whatever coordination or new agency was warranted.<sup>528</sup> Between technical committee meetings, Miller and J.C. Leukhardt discussed changing the name of the committee to include “parole,” a change that had substantive implications in moving the focus to penology.<sup>529</sup> In October the group rehashed the desired ends but came up with two concrete proposals, one for the federal government and one for its own mission. A new Department of Welfare should house many of the functions of crime prevention. For the most part, a subcommittee would handle the report.<sup>530</sup>

A small group, working outside the official meetings, now drove most of the substantive theoretical work, while the meetings continued the repetitive endeavor of pondering institutional reorganization. Miller ensured a vision of crime prevention as capacious and informationally oriented as the Advisory Committee’s posture. Interviews aimed to improve insight into the very meaning of crime prevention. One interview with a doctor saw rehabilitation as important to “public health.” Studies looked into institutions of “hospitalization, education, vocational guidance and social welfare.”<sup>531</sup> Even as Miller pondered the theoretical boundaries of prevention, the committee’s inquiries reaffirmed the importance of ongoing institutional work.

At the next several meetings, the technical committee spoke mainly in general terms, sometimes in circles. At the second meeting, on June 9, Miller repeated his interest in a broadened vision, covering both preventive work and treatment, urging the recognition that the general improvement of social conditions was paramount. The meeting considered opportunities for activating bureaucratic activities toward crime prevention. Perhaps the Social Security Board could leverage states into passing good legislation. Beattie discussed the four kinds of relevant statistics the Board of Statistics collected—state and federal prisoners, criminal cases, prisoners in state and county jails, and juveniles—while informing Miller they weren’t really involved with crime prevention.<sup>532</sup> At the July 15 meeting the members each discussed the work being done by the various agencies. They laid out a list of tasks being done and those needed. Most of the work needed, however, amounted to more fact-finding. The Census Bureau had done research into the administration of criminal justice, and now a broader scope of research could include cases from the arrest through trial. The Bureau of Prisons had studied penal treatment. What was needed was a broader survey looking into the efficacy of programs. The Office of

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<sup>526</sup> Conference of Technical Committee on Probation and Crime Prevention, 15 April 1937, PICCHWA Box 43: Vol III.

<sup>527</sup> Interdepartmental Committee on Health and Welfare Activities: Subcommittee on Probation and Crime Prevention, 12 February 1937, in PICCHWA Box 39: 1937–40, Parole and Crime Prevention, 1936–1938.

<sup>528</sup> Interview with Justin Miller, 22 April 1937, in PICCHWA Box 39, Folder: ParoleCrimePreventionReport1938.

<sup>529</sup> Miller to Leukhardt, 10 August 1937; Leukhardt to Miller, 13 August 1937. In PICCHWA Box 39, Folder: ParoleCrimePreventionReport1938.

<sup>530</sup> Summary of Conference of Working Committee, Technical Committee on Probation, Parole, and Crime Prevention, 7 October 1937, 2:30pm PICCHWA Box 43: Vol III.

<sup>531</sup> Interview with Dr. Sanders, re Survey of Release Procedures, 10 March 1937, PICCHWA Box 6.

<sup>532</sup> Minutes of Conference of Working Committee Technical Committee on Probation and Crime Prevention, 9 June 9 1937, 3:00PM PICCHWA Box 43: Vol III.

Education studied city behavior clinics, college and community crime prevention programs, statistics for day-schools and the disabled, and adult prisoners. What was needed was more evaluation of crime prevention school projects. The WPA had studied after-treatment adjustment and causes behind delinquency. What was needed was a continuation and expansion of these studies.<sup>533</sup>

A change in personnel would soon radicalize the crime prevention vision even further. Fearing a conflict of interest, Miller, now appointed to the U.S. Court of Tax Appeals, resigned from his chairmanship, to the consternation of fellow members as well as Roche. When Miller became a member of the Board of Tax Appeals, he quickly relinquished his role at the Advisory Committee.<sup>534</sup> Miller had long avoided appearances of impropriety. He expressed concern to Cummings about being asked to be on the board of crime prevention organizations in a way that might give undermine federal legitimacy. Despite such longstanding concerns, Miller continued to exercise influence over the technical committee's vision.<sup>535</sup>

Miller's social welfare approach came through in his suggestions for a replacement, both of whom were not in positions of government. One of the suggestions, according to Kathleen Lowrie of the Interdepartmental Committee had "an excellent reputation as a psychiatrist, but I don't think the Committee needs a psychiatrist."<sup>536</sup> Lowrie herself became the acting chairman of the Technical Committee meetings, and Helen Fuller now stood as the Justice Department's main representative.<sup>537</sup> Together through 1938, the two women stood as the most active members of the Technical Committee.

Fuller's understanding of the crime control problem was capacious and closely hewed to Cummings's and Miller's. She understood crime prevention as transcending questions of juvenile well-being, since adult students needed guidance as well as children.<sup>538</sup> In 1938 she worked closely with *Building America*, a publication sponsored by the Society for Curriculum Study, which was producing a series of pro-New Deal features. She found it best to portray the predicament of crime prevention strategically. She arranged to get photographs from the FBI for editor Oscar W. Heimlich and, more important, worked to "simplify" the outline to the special edition on crime. She recommended a basic story of what causes crime and how to control it, and suggested he contact Thomas Meryweather of the Crime Prevention Association of Philadelphia, whose new publication "Crime Prevention Pays" articulated her general take. In the atmosphere of radical reform Heimlich had to ask which agencies he should contact. Volume IV, No. 2 of

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<sup>533</sup> Minutes of Conference of Working Committee Technical Committee on Probation and Crime Prevention, 15 July 1937, 3:00PM PICCHWA Box 43: Vol III.

<sup>534</sup> Miller to Homer Cummings, 12 December 1937, AGAC GC Box 1, Folder: Attorney General Memoranda (after January 1936).

<sup>535</sup> Memorandum for the Attorney General, 7 November 1935, AGAC GC Box 1, Folder: Attorney General Memoranda (to January 1936).

<sup>536</sup> Miller to Roche, 13 October 1937; Roche to Miller, 20 October 1937, Lowrie to Mary, 29 October 1937, Lowrie to Mary, 30 November 1937—all in PICCHWA Box 39, Parole and Crime Prevention Report 1938, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>537</sup> Minutes of Conference of Working Committee: Technical Committee on Probation, Parole and Crime Prevention, 18 January 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention, 1937–40, Parole and Crime Prevention, 1936–1938.

<sup>538</sup> Fuller to John L Gillin, 16 June 1937, AGAC SF Box 5, Folder: Economic Factors in Crime.

*Building America* would echo Cumming's description of crime as a problem pre-industrial America had largely escaped.<sup>539</sup>

The combined vision of Miller, Leukhardt, and Fuller was as capacious as any before in looking to crime prevention as a welfare issue—but it was also more open to bringing carceral power under the welfare state. An early document considered the different kinds of criminals to be prevent—dangerous, violent ones, habitual ones (like forgers and perjurers), vice criminals, and juveniles. And different kinds of prevention: repression, rehabilitation, prevention by treatment without prison discipline, prevention by anticipation of criminal action. Repression had explained the “great idealization of the work of the Federal Bureau of Investigation, which has been developed during the last few years to a point of perfection never before known in this country, or, perhaps, in the world.” Although they expressed concern about the growing prison population, their respect for repression extended to a vision for carceral society. Indeed, one limitation with the carceral technique was that it was limited to lawbreakers. Crime control had suffered a “fundamental difficulty in human thinking, namely, the conflict which arises by reason of our willingness to apply the most harsh, arbitrary and repressive measures to one who has violated the social code by committing a criminal act, and, on the other hand, our unwillingness to apply any sort of supervision, discipline, or ‘regimentation’ to a person who has not committed a crime. It is obvious that there must be, in every community, large numbers of persons who are more or less inadequate, whose lives must be more or less supervised, controlled and directed, by procedures similar to those used in the case of probation.”<sup>540</sup>

The broad crime prevention vision began to target the intersection between welfare and punishment with an increasing openness to the importance of punishment. In general terms, the New Deal government had become interested in the question of punishment, not only in the planned severity at Alcatraz but from the angle of leniency and reprieve. The Attorney General's Survey of Release Procedures, an attempt to understand the methods of parole throughout the nation, was meeting that November.<sup>541</sup> The project soon required more labor than previously estimated.<sup>542</sup> The intersection of the welfare state and a liberal criminological state was unmistakable, as the Works Progress Administration aided the Attorney General's Survey of Release Procedures in assessing such programs as parole.<sup>543</sup> Now the question on punishment interested the crime prevention theorists in the Technical Committee. Interviews and reports looked into the welfare activities of the Bureau of Prisons, and “medical services” utilized at penal and correctional institutions.<sup>544</sup> Gerlich at the Social Service Division of the Bureau of

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<sup>539</sup> AGACC Box 3, Folder: Bills; Helen Fuller to Oscar W. Heimlich, 12 August 1938; Heimlich to Fuller 8 August 1938; Heimlich to Fuller, 20 June 1938; Fuller to Heimlich: June 15, 1937; Heimlich to Fuller, 14 June 1938; Fuller to Heimlich, 8 July 1938, AGAC SF Box 3, Folder: Building America.

<sup>540</sup> “Report for Technical Committee on Probation and Crime Prevention,” undated draft, PICCHWA Box 39, Folder: Parole and Crime, Prevention, Miscellaneous, 1936–38.

<sup>541</sup> Justin Miller to Sanford Bates, 11 November 1936, AGSRP GC Entry 422 Box 1, folder: conference – Attorney General's Survey November 19<sup>th</sup> and 20<sup>th</sup>. See also “Building Carceral Liberalism,” chapter 4 of this dissertation, for much more on the Survey of Release Procedures.

<sup>542</sup> Wayne L. Morse, Memorandum for the Attorney General, 1 February 1937, AGSRP GC Entry 422 Box 1, folder: Attorney General.

<sup>543</sup> Justin Miller to Honorable Thad Holt, 14 December 1936, Entry 422 GC Box 6, folder: Works Progress Administration. For much more on the WPA and parole, see “Building Carceral Liberalism,” chapter 4 of this dissertation.

<sup>544</sup> Thom to Bixby, 21 April 1937, PICCHWA Box 6, Correspondence with Government Agencies 1935 to 1938.



Prisons explained that rehabilitation, individual treatment, and a stress on diagnosing underlying economic ills helped inform prisoner welfare.<sup>545</sup>

In early 1938 the drafted Technical Committee report circulated. It confronted two obstacles reflecting institutional jealousy, one of relatively low stakes and the other that spoke to its radical reimagining of punishment as a welfare issue. A resentful voice from outside the subcommittee stood as a reminder of the problems with allowing a smaller group to manage the report. Josephine Roche had suggested Gustav Peck, from the Prison Industries Reorganization Administration, as a member of the Technical Committee after it was appointed in May 1937. Peck waited for an invitation to the meeting only to be told that the full technical committee did not convene often and that the subcommittee was doing a thorough job.<sup>546</sup> As the drafted report circulated, Peck voiced his objections. In February Peck wrote to Leukhardt noting that the memorandum of the impending report “was apparently written without the knowledge” of his own organization’s work.<sup>547</sup> Hayes, Leukhardt, and Switzer contemplated the potential public relations fallout.<sup>548</sup> As Fuller tried to explain, not everyone involved with prisons had been represented—the undersecretary of the Department of Justice, for example.<sup>549</sup> Others with relevant input had not had a direct hand in drafting the report. The American Prison Association already gave its recommendation.<sup>550</sup> In March, Peck emphasized to Lowrie that for two and a half years his own government agency had already undertaken surveys of the kind suggested in the report, and that this “obvious omission, albeit unintentional,” revealed a “woeful lack of knowledge.” He ominously said it would be “extremely unfortunate” for the report to be distributed on behalf of the Technical Committee when “only two or three people” actually produced it.<sup>551</sup> Leukhardt, Lowrie, and Fuller mulled over the Peck’s “threatening” attitude and how best to neutralize this.<sup>552</sup> Lowrie offered to Peck that he could draft an addendum letter.<sup>553</sup> Thus did they effectively blunt the first major objection.

The bigger obstacle, approval by Cummings, spoke to the report’s more fundamental stakes—both in its theoretical ambition and its recommended reforms. In reviewing the

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<sup>545</sup> Interview with Mr. Gerlech, Social Service Division, Bureau of Prisons, 6 March 1937, PICCHWA Box 6, Correspondence with Government Agencies 1935 to 1938.

<sup>546</sup> Gustav Peck to Kathleen Lowrie, 21 March 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>547</sup> Peck to Leukhardt, 17 February 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>548</sup> To Lowrie, 11 March 1938; Lowrie to Leukhardt, 9 March 1938; Leukhardt to Lowrie, March 19 1938—all in PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>549</sup> Leukhardt to Miss Switzer, Treasury Department Inter Office Communication, 7 February 1938; Mary H.S. Hayes (National Youth Administration) to Leukhardt, 8 February 1938—all in PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>550</sup> Studebaker to Leukhardt, 10 February 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>551</sup> Gustav Peck to Kathleen Lowrie, 21 March 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>552</sup> Leukhardt to Lowrie, 22 March 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

<sup>553</sup> Lowrie, Draft of letter to Gustav Peck, 11 April 1938, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

Technical Committee's report, as submitted to the Interdepartmental Committee, Cummings could ultimately accept the broad vision but not the most radical of its policy proposals. The report was largely consistent with the last seven years of New Deal crime prevention discourse. In broad strokes and with nebulous corollary prescriptions for action, the Technical Committee identified "two major weakness" in the American war on crime. Repeating the same themes articulated constantly since Cummings's 1934 Conference, the report lamented the "inadequate attention to crime prevention" and insufficient "emphasis on probation and parole."<sup>554</sup>

And Cummings ultimately agreed with the report's expansive understanding of "crime prevention," which went far beyond juvenile programs. As the culmination of half a decade's worth of work, the Technical Committee dispensed with all definitional humility. Crime prevention was "the all-embracing field of activity which includes theoretically all phases of crime control as well as the positive services which prevent even the initial occurrences of delinquency or crime." The report conceded that this capacious formulation made grand strategy difficult. It would require a "decentralization of services," with everything from the National Youth Administration and the WPA to the Social Security Board and the Farm Security Administration involved in the effort. Indeed, for the federal government to wage an "adequate attack. . . on the problem of crime prevention" would require a radical programmatic shift in governing approach, a consideration of "the provision for economic security and personnel security."<sup>555</sup> And to achieve this security, the "first step" would of course be "a scientific and continuous process of fact finding." The intellectual work must persist forever. As would the institutions, which would require expansion and reorganization. So many had a hand in crime prevention, conceived sufficiently broadly, and they would need to expand their operations. Educating children had a "relation to the total problem of social welfare." The Office of Education needed a crime prevention division and the Children's Bureau needed to expand its Delinquency Bureau. The WPA needed to do more on troubled youth. The Justice Department could use a new unit to provide research and information, to advise and improve personnel training. A new "interdepartmental council" would mitigate redundancy. Each department's crime control bureau needed "continuous development." A "progressive attitude" would permeate the institutional trajectory.<sup>556</sup> As radical as these conceptual ambitions were, however, they did not meet resistance from Cummings or the rest of the administration.

But there was one truly revolutionary idea, one that differentiated the Technical Committee's vision from that of the Justice Department, and which proved a bridge too far. The report suggested a new Bureau of Prisons, Probation and Parole—making rehabilitation and punishment into equal national priorities. The Bureau could conceivably remain in the Department of Justice, but, the Technical Committee proposed, it might better fit within a new Department of Welfare.<sup>557</sup> For Cummings, who approved of virtually everything else in the report, moving the prison system into a New Department of Welfare was unrealistic and

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<sup>554</sup> Memorandum: Technical Committee on Probation, Parole and Crime Prevention of the Interdepartmental Committee to Coordinate Health and Welfare Activities, PICCHWA Box 43: Vol III.

<sup>555</sup> Memorandum: Technical Committee on Probation, Parole and Crime Prevention of the Interdepartmental Committee to Coordinate Health and Welfare Activities, PICCHWA Box 43: Vol III.

<sup>556</sup> The CCC hired a million young men in 1936, which was seen as keeping them from committing crimes. The FSA's rural committee was "indirectly engaged" with the problem, and the Social Security Board was perceived to be keeping people secure. See generally PICCHWA Box 43: Vol III.

<sup>557</sup> Memorandum: Technical Committee on Probation, Parole and Crime Prevention of the Interdepartmental Committee to Coordinate Health and Welfare Activities, PICCHWA Box 43: Vol III.

dangerous. At first he voiced his disagreement to Roche in a letter otherwise mostly favorable toward the report. Cummings liked many of the proposals, and reminded Roche that he “some time ago. . . recommended the establishment of a Crime Prevention Unit in the Department of Justice.” But he insisted that the penal and correctional institutions belonged in the department of Justice and that their administration “is not strictly a welfare activity in the usual meaning of that term.”<sup>558</sup>

Cummings’s more extensive critique that came five days later did not only reveal a traditional Justice Department mentality, but suggested some of the real tensions within progressive attitudes toward crime control. Warning against the temptation to “shift things around merely for the intellectual satisfaction,” Cummings said it would “from almost every standpoint. . . be unwise” to meddle with the well-working system, and produced an elaboration in memorandum form. Detection, investigation, and apprehension were all functions of the Justice Department, with the FBI playing a special role. The harmonization of crime suppression, treatment, and rehabilitation worked best under one bureaucracy. Under the Justice Department, prisoners had already been classified according to such factors as probability of recidivism. What is more, treating criminal justice as a welfare issue, lumping prisoners in with “the care and unfortunate is unfair to the latter,” and evoked memories of “days when the insane were placed in jails and the poor in workhouses.” Model progressive states, such as New York, observed a separation of criminals from the needy, as seen in their departments of health, mental hygiene, social welfare, and corrections. California’s Department of Welfare was distinct from its Department of Penology. Connecticut’s Commissioner of Welfare did not meddle with the Board of Directors’ management of corrections.<sup>559</sup> Although in principle Cummings accepted the holistic outlook of crime prevention, he would not countenance a New Deal criminology that blurred the distinction between punishment and welfare.

The circulating report won approval from various bureaucracies, but never produced a permanent crime prevention bureau—much less a Department of Welfare housing America’s prisoners.<sup>560</sup> In June 1938, Roche asked Cummings for his approval to send the report to Roosevelt.<sup>561</sup> He eventually agreed but included his reservations.<sup>562</sup> Eventually, the president purportedly saw it, and Roche asked him in November 1938 if she could share the report.<sup>563</sup> A year and a half later, Hatton Summers from the Interstate Commission on Crime asked Roche for cooperation from the Interdepartmental Committee to better understand the current state of crime prevention and cooperation. But Roche didn’t know how to respond, as Roosevelt had never indicated to her whether to disseminate the report.<sup>564</sup> In the end, the boldest vision the technical

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<sup>558</sup> Cummings to Josephine Roche, 5 October 1938, PICCHWA Box 43: Vol III.

<sup>559</sup> Cummings to Josephine Roche, 10 October 1938; Memo: “Should the Federal Prison System be Transferred to a Department of Welfare?”—both in PICCHWA Box 43: Vol III.

<sup>560</sup> Memorandum for Honorable Oscar L. Chapman, from Commissioner of Education, 31 May 1938, PICCHWA Box 39.

<sup>561</sup> Chairman of Interdepartmental Committee to Attorney General, 8 June 1938, PICCHWA Box 39, Parole and Crime Prevention Report 1938.

<sup>562</sup> Memorandum from J.C. Leukhardt to Mr. Altmayer, 25 October 1938, PICCHWA Box 39, Parole and Crime Prevention Report 1938, Folder: ParoleCrimePreventionReport1938.

<sup>563</sup> Chairman of Interdepartmental Committee to President, 3 November 1938: PICCHWA, Box 39, Parole and Crime Prevention Report 1938, Folder: ParoleCrimePreventionReport1938.

<sup>564</sup> Donald C. Blaisdell to General Edwin Martin Watson, 5 April 1940, PICCHWA Box 39, Folder: Records of the Technical Committee on Probation, Parole and Crime Prevention 1937–1940.

committee offered was the clearest representation of fighting crime as a welfare issue, but portended a degree of coercive repression that could not get off the ground. Having taken on theoretical contours too big for the New Deal state, the grand vision of national crime prevention died in committee.



Miller's and Fuller's vision of crime prevention was the purest expression of New Deal criminology. Crime was a problem of social dysfunction, and so only a broad effort at socio-economic reform—with the scientific and national coordination of all branches and levels of government, community activists, and the private sector—could win the war. It was the vision that bridged the theorists to the practitioners, the local and the national, and accommodated the widest diversity within the war on crime coalition. This lasted until its radical implications translated into a specific and significant reform proposal.

Its definitional malleability gave crime prevention its currency throughout the 1930s, fueling both intellectual exploration and the search for institutional permanence. But although the conceptual capaciousness fostered broad appeal, it also proved unsustainable. The New Deal could not achieve the relatively modest but concrete goal of a permanent federal crime prevention bureau. The less modest project of reforming society to strike at the root of lawlessness and juvenile delinquency implicated almost all social institutions from nuclear families to state prisons, and it meant that information gathering would constantly culminate in the decision that more information was needed. The aspiration culminated in the expressed desire for a kind of security state—a state that guaranteed economic security as a means to discourage crime and physical security against crime as a means of maintaining economic fairness. Crime control as a federally endorsed welfare vision could accommodate plans comparably repressive to those contemplated by the Prohibition-era conservatives. But the state so envisioned went beyond the liberalism of the New Deal war on crime to take on an almost utopian, potentially totalitarian character. Miller's team envisioned not only a fusion of welfare and punishment, but a police state outside the boundaries of prison, dispensing with American liberties for the purpose of preventing all crime.

Federal crime prevention broke under the weight of its own conceit, at the peak of both its open-ended conceptual breadth and its complementary aspiration of thoroughly securing societal order. Miller pursued an increasingly ambitious and theoretical vision that became so all-encompassing and nebulous as to yield few concrete proposals rather than more information gathering and coordination. In Fuller's hands, the Technical Committee finally proposed a bold and specific idea. A Bureau of Prisons, Probation, and Parole was a distinctly New Deal approach, reconciling punishment and rehabilitation. Cummings, a dedicated New Deal Democrat was as devoted to prevention as Miller and Fuller, but he could not abide the reconciliation of repression and rehabilitation alongside each other under the authority of the welfare state.

That crime prevention folded in the immediacy of its radical moment challenges scholarly understandings of the New Deal war on crime in respect to liberal ideology. Claire Potter's formulation in *War on Crime*, opposing Justin Miller to J. Edgar Hoover, traces an important

insight about the contradictions in the New Deal war on crime.<sup>565</sup> But three crucial caveats are in order. First, prevention and repression were not dueling visions. Miller saw no conflict between a national police force and community approaches. It was rather the contradictions within the distinctly national social welfare approach that proved unsustainable. Second, because the New Deal liberals easily accommodated both Hoover's and their own designs of repression, there is no reason to think Hoover's war on crime would have been compromised. Third, neither the triumph of national policing nor the institutional failures of federal crime prevention undercut the importance of Miller's vision within the long-term development of liberalism. Because of the emphasis on social process, the struggle for prevention became its own justification. The struggle only vindicated the liberal vision—one that found encouragement in its successful construction of law-and-order infrastructure and an energizing challenge in the setbacks it faced in the realm of social welfare.

Despite the failure at reform, crime prevention nevertheless counted as a success for the war on crime coalition, bringing civil society and every level of government behind a national criminological vision. Both pragmatic and aspirational, the New Dealers characteristically took pride in the punitive state even as they aspired toward a utopia. In the future of liberal reformism, economic and social security would remain the goal even as repression proved the result. Nowhere was this clearer than in the realms of detention, incarceration, parole, and probation. Although crime prevention had failed to directly revolutionize these domains, New Deal liberalism through other mechanisms dramatically reshaped American penology, finally reconciling the longstanding tensions between carceral discipline and progressive rehabilitation.

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<sup>565</sup> Potter, *War on Crime*, 184.

## Chapter 4

### *Building Carceral Liberalism*

“Alcatraz represents the ultimate in isolation,” wrote former Attorney General Homer Cummings, “[a]nd yet, oddly enough, it lies in the very midst of the busy, hurried life of the bay region.” In the mile and a half between the island prison and San Francisco one could see “tiny boats” and “great ocean liners.” The port linking America’s west to East Asia overflowed with the bustling free commerce and the “hum of life.” A bitter juxtaposition afflicted the inmates: “life” was “so near, but liberty so far.”<sup>566</sup>

It was 1939, and Alcatraz was under attack. The assault came from within, as American newspapers and even Attorney General Frank Murphy, Cummings’s successor, questioned the prison model in theory and practice. The retired Cummings responded with an unflinching defense of the prison’s uncompromising discipline and its enlightenment spirit. Despite crude comparisons to France’s penal colony, Alcatraz was no “American ‘Devil’s Island.’” While some misguidedly condemned it a “place of brutality. . . a throwback to the Middle Ages,” others wrongly celebrated the reputation, believing the “murderers and kidnapers. . . deserved such ‘brutal’ treatment.” But Cummings sought to correct both extremes.<sup>567</sup> In its claimed respect for the inmates’ humanity no less than its unremitting regime of control, Alcatraz symbolized its mastermind’s devotion to law and order.

While it has long captured popular imagination, Alcatraz sits uneasily among scholarly treatments of the New Deal.<sup>568</sup> General histories barely mention it—or prisons at all.<sup>569</sup> Yet surging incarceration characterized the Depression decade. Between 1930 and 1940, the federal inmate population rose from 12,964 to 19,260, while the state inmate population climbed from 107,532 to 146,325 (see Figure 4.1).<sup>570</sup> Although the federal prisoner population crested under President Herbert Hoover and even receded in 1934 and 1935, by 1938 the figure rebounded and the Roosevelt administration could claim more people than ever under federal supervision, including probation and parole (see Figure 4.2). Meanwhile the New Deal sponsored prison construction efforts at the state level. The overall state-level increase, disproportionately in the South, more than offset the volatility at the federal level.<sup>571</sup> In 1939, the year Cummings defended Alcatraz, imprisonment broke new records. Despite expectations that legalizing alcohol would reduce incarceration, and despite falling crime in the mid-1930s, the combined state and federal prison population climbed to 179,818 in 1939—up from 137,887 in 1932. Whereas the year before the New Deal, 111 out of 100,000 Americans were serving sentences in captivity, by 1939 the figure rose to 137 (see Figure 4.3). This per capita figure would not be

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<sup>566</sup> Cummings, “Why Alcatraz Is a Success,” *Colliers*, 29 July 1939.

<sup>567</sup> Cummings, “Why Alcatraz Is a Success,” *Colliers*, 29 July 1939.

<sup>568</sup> Noting that New Deal contemporaries Harry Elmer Barnes and Negley K. Teeters saw Alcatraz as embodying the “paradoxes” of the new penology, David Ward with Gene Kassebaum depict Alcatraz as a “new chapter in American penal history as a prison explicitly designed to hold and punish the nation’s criminal elite” and see it as posing a paradox for a “progressive evolution of American penology” toward “corrections.” Ward and Kassebaum, *Alcatraz: The Gangster Years* (Berkeley: University of California Press, 2009), 2.

<sup>569</sup> David M. Kennedy’s *Freedom from Fear* has no index entries for “Alcatraz,” “jails,” or “prisons,” although it has a somewhat robust entry on “prisoners of war.” See pp. 879, 903, 919.

<sup>570</sup> *Historical Corrections Statistics in the United States*, 29.

<sup>571</sup> *Historical Corrections Statistics in the United States*, 29.

reached again until 1979, forty years later, as the late-twentieth-century era of mass incarceration began in earnest (see Figure 4.4).<sup>572</sup>

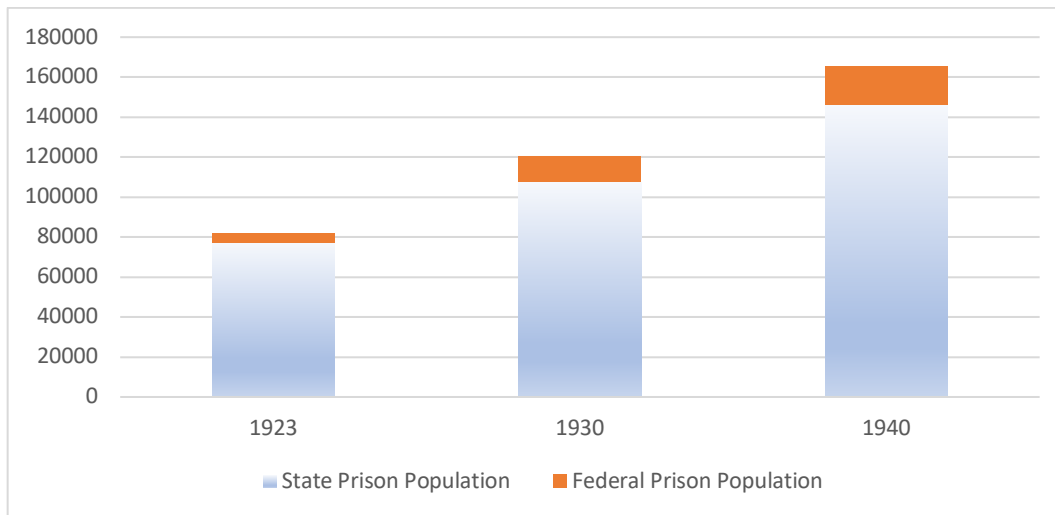


Figure 4.1 Federal and state prison populations in 1923, 1930, and 1940.

Source: Graph created from data in Historical Corrections Statistics in the United States, Table 3-2, 29.

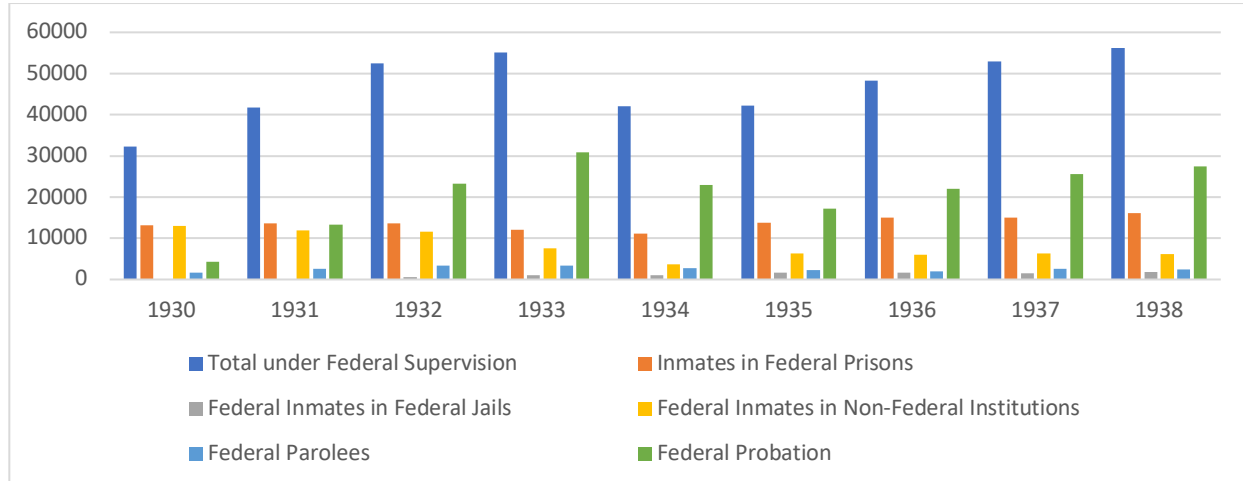


Figure 4.2 Numbers under various forms of federal supervision, 1930–1938.

Source: Graph created from data in Survey of Release Procedures, Vol. V, 310.

<sup>572</sup> U.S. Department of Justice Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850–1984*, 35. Qualitative changes accompanied the rise in overall numbers, as definite sentencing peaked in 1940—61 percent of sentences, up from 51 percent a decade earlier. *Historical Corrections Statistics in the United States*, 41.

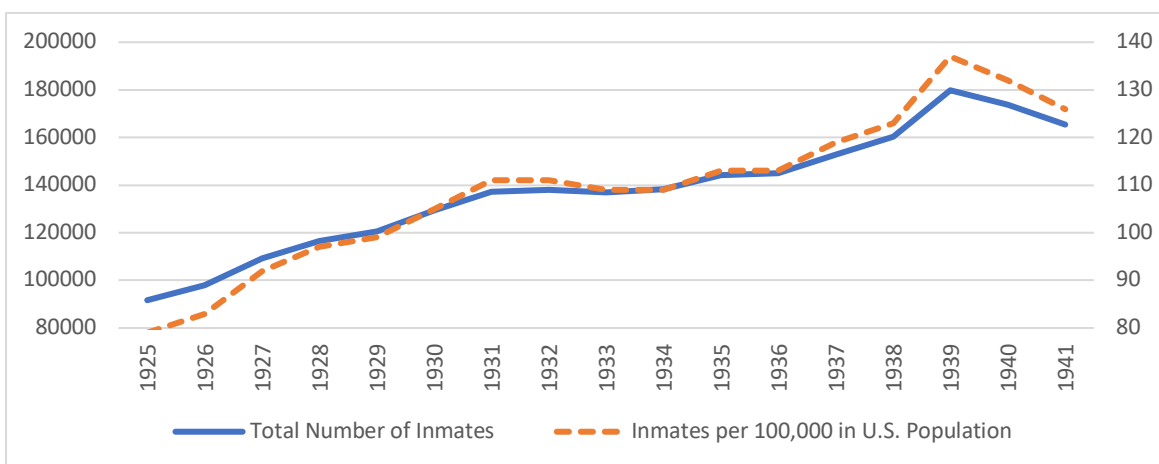


Figure 4.3 Combined federal and state prison population, 1925–1941. Source: created from data in *Historical Corrections Statistics in the United States, 1850–1984*, Table 3-7, 35.

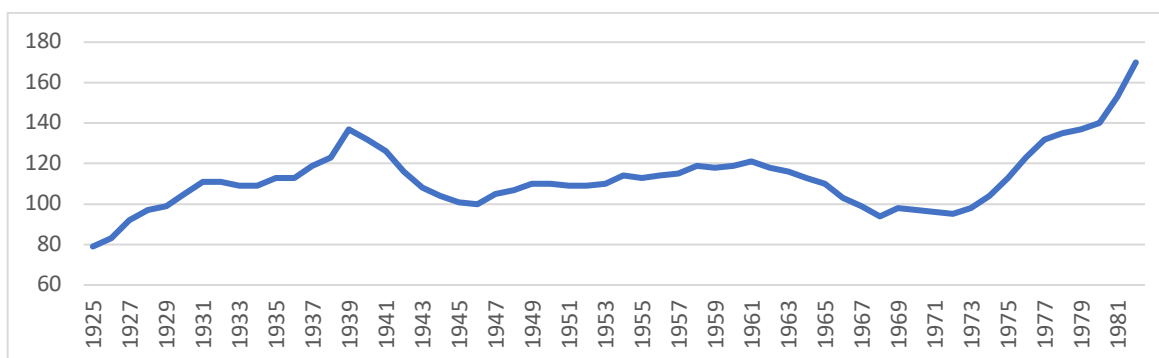


Figure 4.4 Combined federal and state prisons per 100,000 population, 1925–1982. Source: Graph created from data in *Historical Corrections Statistics in the United States, 1850–1984*, Table 3-7, 35.<sup>573</sup>

Scholars have not fully integrated these 1930s trends of incarceration into the greater story of New Deal state-building. Alcatraz is a curiosity belonging to the war on gangsters, separated from the narrative of the welfare state, whose Works Progress Administration rarely appears in histories of crime and punishment.<sup>574</sup> Although historians have gestured toward the place of

<sup>573</sup> This graph is somewhat deceptive in that the figures from 1976 onward are marginally more inclusive, but if anything this slightly exaggerates the late 20<sup>th</sup> century per capita prison surge compared to the 1930s phenomenon.

<sup>574</sup> The historiography of the WPA does speak to national power and cultural consciousness. Christine Bold notes that “the Works Progress Administration (WPA) Arts Projects were on the cusp of the modern bureaucratization of culture, at the moment when the federal government exponentially extended its reach into people’s daily lives.” Christine Bold, *The WPA Guides: Mapping America* (Jackson, MS: University Press of Mississippi, 1999), Xiii. In *Building New Deal Liberalism*, Jason Scott Smith emphasizes the WPA’s role in transforming liberalism, and even



1930s crime-fighting in political legitimation, relating carceral history to the history of liberalism, they seldom focus on New Deal penology.<sup>575</sup> Those historians who have actually considered the particular impact of the New Deal on the long-term history of incarceration have tended to approach the 1930s in two ways. One interpretive tendency marks the New Deal as the end of a long-nineteenth-century story of prison labor. Pushing against the long-dominant interpretations associated with Michel Foucault and David Rothman that emphasized bodily and spiritual discipline, Rebecca McLennan has shown that the antebellum and Victorian prison models prioritized productive, profitable prison labor, before being largely overtaken by a post-industrial prison model in the interwar period.<sup>576</sup> Others have focused on New Deal leadership giving national support to activist efforts to separate prison labor from the market economy, particularly through Roosevelt's creation of the Prison Industries Reorganization Administration (PIRA).<sup>577</sup> The second interpretive tendency looks retrospectively through the late-twentieth-

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discusses the construction of Japanese internment camps, but says little about penal institutions in the 1930s. Smith, *Building New Deal Liberalism: The Political Economy of Public Works, 1933–1956* (New York, Cambridge University Press, 2006).

<sup>575</sup> Marie Gottschalk traces the story of mass incarceration to the nineteenth century, and briefly suggest a key predicament for national authority in the 1920s, which the New Deal began to address generally through its war on crime. She quotes Virgin W. Peterson's insight that "uncontrolled crime had become one of the most serious threats to democracy." Gottschalk, quoting Peterson, in *The Prison and the Gallows: The Politics of Mass Incarceration in America* (Cambridge: Cambridge University Press, 2006), 59. Ruth Wilson Gilmore, on the other hand, sees the "balance of power relations" and questions of "state illegitimacy" as core to the New Deal's background to modern incarceration. Citing Gregory Hooks, Gilmore suggests that the state-building contradictions of the New Deal welfare state came to a head with the coercive militarism of World War II, during the end of which "the motley welfare agencies that took form during the Great Depression" finally became "truly operational" (25). Gilmore also sees the move toward national norms as allowing Southern racial politics to metastasize. The regional politics on which the New Deal relied—"desperately dense relationships" among Democrats nationwide—"institutionalized Jim Crow without speaking its name," and thus did the peculiarities of the 1930s extended beyond the "welfare warfare state" to include "the extension of regional norms to national relationships." Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley, CA: University of California press, 2007), 80, 79–9, 136.

<sup>576</sup> On Michel Foucault's historically informed theory on the "essentially *corrective*" nature of discipline and its broader social purpose, see Foucault, *Discipline and Punish: The Birth of the Prison*, trans. by Alan Sheridan (New York: Vintage Books, 1995 [1977]), 179, inter alia. David J. Rothman indeed finds Foucault's "mode of analysis" to be overly deterministic. The "prison did not descend once and for all from some capitalist spirit," but rather emerged through "choices" and "decisions" regarding a "theory of punishment." Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America* (Boston: Little, Brown and Company, 1980), 11. But while Foucault focused on the normalizing emphasis on punishment, an emphasis Rothman largely shared except for its materialism, Rebecca M. McLennan has shared Rothman's emphasis on prisons' contingent development while returning political economy to the analysis. McLennan's *Crisis of Imprisonment* unearthed the long history of this development, going back to the early republic, culminating in the early New Deal when the experiments of New York became the leading model for the nation. McLennan invites readers to ponder the transformation from a for-profit system of coerced labor to a post-industrial form of punishment. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of the American Penal State*, (New York: Cambridge University Press, 2008), 417–67. For a critique of Rothman's treatment of progressive era incarceration, see McLennan, *Crisis of Imprisonment*, 278, fn 113.

<sup>577</sup> Matthew Pehl identifies a core tension in New Deal penal reform as the role of labor in the mixed economy in "Between the Market and the State: The Problem of Prison Labor in the New Deal," *Labor: Studies in Working-Class History* 16, Issue 2 (2019): 77–97. Speaking in more general terms, Ruth Wilson Gilmore notes that the "New Deal labor compromise had operationalized reformist politics by renovating structures of the racial state." Gilmore, *Golden Gulag*, 136. For the limits of PIRA see Maria Ponomarekno, *The Department of Justice and the Limits of the New Deal State, 1933–1945* (PhD Dissertation: Stanford University, 2010).

century carceral state, which is depicted as a retreat from New Deal liberalism, or at most an expression of liberalism as consummated in the 1940s security-state rather than in its activist 1930s form.<sup>578</sup> By stressing the rupture of postwar politics and policy, scholars suggest that the New Deal, supportive of rehabilitation and improved labor conditions, was an abortive or ineffective obstacle to the contemporary prison state.<sup>579</sup> Thus is the New Deal separated from both the early 1930s and the much later iteration of the war on crime.

Perhaps because the New Deal unfolded at key junctures in the complicated histories of liberalism, federal power, law enforcement, and penological ideas, scholars have found it more legible as a bookend rather than as a clearly enduring period of transformation. McLennan has suggested the importance of the 1930s, as Sing-Sing Warden Lewis Lawes's 1920s model of "penal managerialism" spread from New York across the northern United States, displacing the economic priorities of productive labor.<sup>580</sup> This interpretation invites more consideration of the Roosevelt administration's penological undertakings at the national scale, its myriad implications for liberalism and federalism. If prisons freed from profit swelled, perhaps Foucauldian models of discipline applied better to the state-building liberalism of the New Deal than to the fiscally conscientious liberalism of the nineteenth century.<sup>581</sup> And although historians rightly recognize postwar developments that do not inexorably trace back to the New Deal, the literature suggests

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<sup>578</sup> In one exception, situating carceral discipline squarely in the political history of the second quarter of the 20<sup>th</sup> century, Charles Bright through a largely Foucauldian framework approaches maximum-security incarceration in Michigan as a study of the "parallel constitution of political order and carceral regimes." Bright is clear, however, that his study does not serve as a synecdoche for "some general theme in U.S. corrections" or as "the prison experience as a whole" but rather as a critical examination of one "prison in its historical epoch. . . in the political geography of the state of Michigan over time." In particular Bright considers the politics of patronage and labor reform. Charles Bright, *The Powers That Punish: Prison and Politics in the Era of the 'Big House,' 1920–1955* (Ann Arbor, MI: The University of Michigan Press, 1996), 29, 4.

<sup>579</sup> In general, most origin stories see late 20<sup>th</sup> century incarceration as deviation from New Deal political economy. Jordan T. Camp offers an extensive examination of mass incarceration as a component of the "neoliberal state" as "The carceral population grew from two hundred thousand people in the late 1960s to more than 2.4 million in the 2000s." Camp, *Incarcerating the Crisis: Freedom Struggles and the Rise of the Neoliberal State* (Berkeley: University of California Press, 2016), 3. Genealogies of mass incarceration as a mode of governance often consider the New Deal through the postwar lens, implying a tension between welfarism and carceral power. Jonathan Simon indeed sees the rise of incarceration as a major mode of postwar governance as a sign of the crisis of New Deal liberalism. Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford: Oxford University Press, 2007), 22–31. In *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016), Elizabeth Hinton suggests mass incarceration as both constitutive of and a deviation from postwar welfare statism. In deciding on whether welfare was the path not taken or an instrumental ingredient in building the carceral state, the New Deal would be informative. Another approach linking New Deal liberalism to postwar carcerality emphasizes the wartime construction of a welfare state predicated on formalizing criminality and deviancy. See Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton, NJ: Princeton University Press, 2009).

<sup>580</sup> As McLennan explains, the new penologists had exposed the indignities of the prison system and emphasized the need for justice and the participatory involvement of inmates. Lawes, on the other hand, developed the "original new penological project into a new, managerialist penal order." McLennan, *Crisis of Imprisonment*, 448. McLennan writes that "By 1935, the managerial system of imprisonment was primed to become the rule rather than the exception in American legal punishment. . . [and this] anticipated and distilled the basic dynamics of the post-industrial prison order" (466).

<sup>581</sup> Foucault sees the hardening of criminal categories and the relentless of punishment as arising from nineteenth century bourgeois liberalism. This began with the closing of loopholes after the French Revolution, as "landed property became absolute property." Foucault, *Discipline and Punish*, 85.

the need for more attention to the modern carceral state's roots in the national mobilization and political modernization of the 1930s.

The present chapter identifies New Deal penology as the caldron in which strains of earlier intellectual and institutional development formed the foundation of the modern carceral state. Like the Progressive Era's New Penologists, New Deal authorities decried rather than celebrating any association between their prisons and *brutality*. This term arose as a foil time and again, and one could identify their proclaimed rejection of brutality as a proclaimed devotion to some modicum of *humanity*. New Deal penology championed this humanity, both in eschewing brutality and in stressing individualized correction. And as with the penal managerialism of Lewis Lawes, the New Deal penologists stressed prison *discipline* to maintain order, within and outside prison walls—through parole and probation and more generally through the greater public. But the New Dealers also inherited the Herbert Hoover administration's short-term problems and long-term institutional trajectory. From 1929 to Roosevelt's inauguration, America's swelling prisons seemed a conspicuous microcosm of the nation's broader problems—economic depression, a crime panic, and threats to social order. Much of the nation, including the Hoover administration, responded with a temperamental *carceral conservatism*, prioritizing the achievement of order above the more reformist impulses. Many took this carceral conservatism further, and condemned parole and probation for allegedly coddling criminals and endangering the public. The realities of national power and politics offered both opportunities and challenges for Roosevelt once he took over. The states dominated incarceration, which only reinforced the importance of federal leadership, both in setting examples with its fraction of the prison population and in its interaction with the states. With their experiment at Alcatraz, the New Dealers took discipline even further than their predecessors. With their Survey of Release Procedures, they sought to defend parole and probation against critics. In these and other ways, Roosevelt, Attorney General Homer Cummings, Prison Bureau Director Sanford Bates, and Justice Department official Justin Miller, despite disagreements, worked to reconcile the numerous demands putting strain on the prison system.

Within two terms, the New Dealers met their daunting challenge: to manage the radically transforming penal landscape while integrating the trends of reform and addressing the crises of law and order. They built a new form of *carceral liberalism*—deeply influenced by the New Penologists' emphasis on humanity and the disciplinarian program of northeastern penology—while they were both empowered and constrained by operating on the national scale. To maximize political stability, carceral liberalism had to respect the somewhat consensual relationship between federal and state authorities. Roosevelt could not apply one formula mechanically. Instead of a grand strategy, carceral liberalism was an exercise in managing the paradoxes of discipline and rehabilitation. This meant new national leadership to prison discipline while understanding how state prison authorities administered their system nationwide. It meant embracing both incarceration and parole in mutual symbiosis while defending seemingly contradictory policies from the same principles. The paradoxes within Alcatraz, within the Survey of Release Procedures, and within the national sponsorship of state prisons brought each project more tightly into the whole. To comprehend the enduring impact of

carceral liberalism on the modern penal state, it is worthwhile to examine the Roosevelt administration's strategic national leadership in both incarceration and rehabilitation.<sup>582</sup>

### Incarcerating the Depression

In 1933, Roosevelt inherited correctional systems amidst national crisis and staggering transformation. The political atmosphere of the early Depression, coinciding with Herbert Hoover's war on crime, prioritized imposing order. Chief among the threats in the late 1920s and early 1930s were high-profile prison riots. Violence struck in 1928, as one riot in Miami proved fatal.<sup>583</sup> But the riots got worse in 1929. In January guards with tear-gas suppressed rioters Holmesburg, Pennsylvania.<sup>584</sup> In July 1,300 inmates rose up at set fires at Clinton Prison, in Dannemora, New York, where guards responded with tear-gas and explosives and three prisoners died.<sup>585</sup> In August the violence went federal in several hours of struggle at Leavenworth.<sup>586</sup> In October twelve people, including seven guards, died in a prison mutiny in Canyon City, Colorado.<sup>587</sup> Then, in December, nine hundred inmates rose up in New York's Auburn Prison.<sup>588</sup> Major riots continued the next couple years—notably in Welfare Island in the summer of 1930 and at Michigan State Penitentiary where six died in August 1931.<sup>589</sup>

The alarming frequency of riots provoked consideration about connections and structural causes. The press entertained rumors that different prison inmates took inspiration from each other or coordinated underground.<sup>590</sup> Many blamed overcrowding, which authorities could presumably address with either less incarceration or more prisons. Some traced the problem to structural repression. An inmate at Welfare Island blamed racial harassment and segregation.<sup>591</sup> Deputy Warden Frank Kness of Statesville Illinois attributed his state's volatile overcrowding to alcohol prohibition.<sup>592</sup> The press identified such irritants as bad food and poorly ventilated

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<sup>582</sup> Aspects of this thesis resemble the insights of David Garland, who has identified a long development of the “penal-welfare state” in the United States as well as Britain as a process of nineteenth century classical liberalism giving rise to a social-contractual conception of the war on crime, reaching its apotheosis in the 1970s. With respect to the New Deal era in particular, Garland avers that “If it was a *Hobbesian* problem of order than first prompted the development of the criminal justice system in early modern Europe, one might say it was a *Marxist* problem of order—the social and political instability caused by class antagonism and unregulated economic exploitation—that first motivated penal-welfarism.” Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001). Garland does not devote much space to the possibility that New Deal penology helped legitimate the national state and settle its contradictions across society and the various levels of government, thus finally settling the Hobbesian question in the particularly unique context of U.S. federalism. Also see, on the historical development of the British penal-welfare state, Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower: 1985).

<sup>583</sup> “Felon Slain in Convict Prison Riot,” *Los Angeles Times*, 1 August 1928.

<sup>584</sup> “Prison Riot Soon Ended by Tear Gas,” *Los Angeles Times*, 13 January 1929

<sup>585</sup> “3 Convicts Killed, 20 Hurt, 1,300 Riot at Dannemora,” *New York Times*, 23 July 1929.

<sup>586</sup> “Felons, Guards Fight for Hours in Leavenworth,” *Chicago Daily Tribune*, 2 August 1929.

<sup>587</sup> Orders Inquiry into Colorado Prison Mutiny, *Chicago Daily Tribune*, 5 October 1929.

<sup>588</sup> David Rankin Barbee, “Five Prison Revolts Make Nation Wonder,” *The Washington Post*, 15 December 1929.

<sup>589</sup> “Rivalry over Ball Diamond Stirs Race Clash at Prison,” *Washington Post*, 6 August 1930; “Prison Riot Kills 6,” *New York Times*, 28 August 1931; “Prisoners and Food,” *New York Times*, 27 January 1932.

<sup>590</sup> David Rankin Barbee, “Five Prison Revolts Make Nation Wonder,” *The Washington Post*, 15 December 1929.

<sup>591</sup> “State Prison Break Feared in Missouri,” *New York Times*, 13 April 1930; “Prison Inmate Bares Inside Story of Riot,” *New York Amsterdam News*, 13 August 1930.

<sup>592</sup> “Warden Tells How Dry Law Crowds Prison,” *Chicago Daily Tribune*, 4 April 1931.

facilities.<sup>593</sup> The willingness to consider the prisoners' plight reinforced the connection between morale and prison discipline, the balance of enforcement and accommodation. The *Chicago Daily Tribune*, responding to the Canyon City riot, asked whether "the prison policy was too kindly" or "too harsh."<sup>594</sup> Some in the press thought radically about social dynamics. *The New York Times* looked abroad for inspiring models, finding that "Labor in the Soviet prisons is balanced by educational opportunities."<sup>595</sup>

Stark comparisons existed domestically as well, even just within the state of New York. Prompted by the Auburn riot, a *Washington Post* piece credited a progressive-minded warden who rejected draconian punishments for the relative order at Sing-Sing prison.<sup>596</sup> Governor Franklin Roosevelt, moved by the nationally publicized Auburn and Clinton Prison uprisings, also found Sing-Sing inspiring. In December 1929 Roosevelt demanded changes.<sup>597</sup> The governor articulated his penological vision that included "adequate punishment" as well as "the treatment of prisoners" that would allow them "to resume their places in the community." He urged a slate of reforms—more prisons, improved facilities, and modernized parole and probation systems. He wanted to bring back "good conduct" time to "improve the morale of the prisoners of the State." In January 1930 the New York legislature unanimously approved Roosevelt's bill appropriating \$750,000, much of which targeted overcrowding and some of which funded better inmate meals and clothing. Citing the "serious riots," Republicans pushed for an investigation and Roosevelt worked to bring Lewis Lawes's Sing-Sing model to his state's prisons.<sup>598</sup>

But taking any one penological vision to the national scene would pose a challenge. The New Dealers took the helm of a system in momentous transition. Aside from such military installations as the naval prison in Portsmouth, Maine, the federal civilian prison system had rapidly grown in living memory. No designated federal prisons or jails existed throughout Homer Cummings's childhood. The first, McNeil Island, in Washington, became the first regular federal prison in 1890, well after Roosevelt's birth. Before the 1929 stock market crash there were only three federal penitentiaries—McNeil; another in Leavenworth, Kansas, founded in 1895; and a third in Atlanta, which opened in 1902. In addition, a national reformatory for men in Chillicothe, Ohio, and a women's institution in Alderson, West Virginia, opened in the 1920s. In 1929 Leavenworth moved from the Department of War to become a civilian installation. Only in 1930 did the Federal Bureau of Prisons arise. Lewisburg became home to a medium security penitentiary in 1932, and reformatories opened in El Reno, Oklahoma, and in Petersburg, Virginia in 1933, as did a medical center in Springfield, Missouri.<sup>599</sup> The total number in federal confinement, including jails, rose from 1,304 in 1890 to 26,288 in 1930.<sup>600</sup> Roosevelt's generation witnessed this breathtaking ascendance of federal penal installations from practically nothing.

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<sup>593</sup> "Felons, Guards Fight for Hours in Leavenworth," *Chicago Daily Tribune*, 2 August 1929.

<sup>594</sup> "Orders Inquiry into Colorado Prison Mutiny," *Chicago Daily Tribune*, 5 October 1929.

<sup>595</sup> "Prison Reform Tried in Many Other Lands," *New York Times*, 18 May 1930.

<sup>596</sup> David Rankin Barbee, "Five Prison Revolts Make Nation Wonder," *The Washington Post*, 15 December 1929.

<sup>597</sup> "Behind the Walls of New York's Prisons," *New York Times*, 22 December 1929.

<sup>598</sup> W.A. Warn, "Legislature Passes Roosevelt's Bill for Prison Relief," *New York Times*, 7 January 1930; McLennan, *Crisis of Imprisonment*, 458.

<sup>599</sup> *Attorney General's Survey of Release Procedures* (Department of Justice, Washington, D.C., 1939), Vol. V, 308, 311.

<sup>600</sup> *Survey of Release Procedures*, Vol. V, 309.

Federal procedures for release were even more novel. Following a 1916 Supreme Court finding that federal courts had no inherent authority to indefinitely suspend sentences, the next decade saw numerous attempts to establish this authority. A 1925 law assigned this power to district courts except for the one in Washington, DC, and such authority expanded in 1930. There were few designated federal probation officers before 1930. Originally run by prisons and penitentiaries, parole also developed quickly and in an ad hoc manner. The attorney general utilized parole boards to grant parole to federal prisoners housed in state institutions.<sup>601</sup>

A burgeoning complexity of federal and state carceral issues welcomed Roosevelt when he became president in March 1933. By June, 12,148 people lived in federal institutions excluding jails, which housed another 1,043, and another 7,590 federal prisoners resided in non-federal institutions. Federal parole accounted for 3,306 people, another 106 were on conditional release and 30,870 on federal probation.<sup>602</sup> The diversity of issues in state prisons, which held the vast majority of prisoners, also proved daunting. Four main types of state correctional institutions dotted the Depression-era landscape. Modern industrial penitentiaries loomed large. Prison camps operated on roads, farms, and forest land. Reformatories and “experimental institutions” kept a thousand more detained. The number of state inmates was skyrocketing—by 140 percent from 1904 to 1935, and from 107,532 to 126,258 in the short period between 1930 to 1935.<sup>603</sup>

Roosevelt’s team confronted these carceral transformations as both a long-term structural problem and a matter of national urgency. In the long term the challenge was managing the continuity of progressive reform and directing it toward a more politically sustainable trajectory. The New Deal crime warriors sought to accelerate the evolution of correctional structures and ethos, up from a dark past of repression, brutality, and corporate profit, and toward a future of rehabilitation and enlightened public interest.<sup>604</sup> They knew that penitentiaries had historically been for “both the punishment and the reformation” of subjects, and asked fundamental and even abstract questions about their purpose—punishment or deterrence or something else.<sup>605</sup> They worried about social effects and believed without an interagency effort and respect for prisoners’ humanity, a single-minded attempt at order would fail even on its own terms

But in the immediacy, the Roosevelt administration acquired the program, problems, and momentum of its predecessors. The early New Deal built on the carceral conservatism of the early 1930s. Roosevelt’s expansion of the criminal code fueled incarceration and the first prison opened under Cummings broke new ground in emphasizing security. From 1933 onward, Cummings prioritized detention facility construction. In 1935 he expressed concern to Assistant Attorney General William Stanley that “our institutions are filling up” and wondered about Stanley’s progress in his “attempt to secure more jails.”<sup>606</sup> Throughout Roosevelt’s first term, Cummings provided direct and indirect support to national and state penal systems even as his Justice Department aspired to elevate America from its past of unthinking repression.

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<sup>601</sup> *Survey of Release Procedures*, Vol. I, 1–2, 7, 17.

<sup>602</sup> *Survey of Release Procedures*, Vol. V, 310.

<sup>603</sup> *Survey of Release Procedures*, Vol. V, 9, 27.

<sup>604</sup> For a critical look at the self-referential whiggish outlook, spanning from the progressive era through the interwar era, see Bright, *The Powers That Punish*, 10–14.

<sup>605</sup> *Survey of Release Procedures*, Vol. V, 9.

<sup>606</sup> Office Memorandum to Assistant to the Attorney General, William Stanley, June 17, 1935, Swisher, *Selected Papers of Homer Cummings*, 271.

Early in the New Deal, personnel and policy suggested a heightened emphasis on the recent legacies of both discipline and humanity. Sanford Bates embodied these dualities of punishment and rehabilitation, of interwar policy continuity and reform. The personification of northeast prison reformism, Bates saw the “battle against crime” as requiring “one master motive controlling all operations.”<sup>607</sup> As Boston’s Commissioner of Penal Institutions immediately after World War I, he had “discovered that these prisoners were human beings after all.” Maybe they “had families” and if only they “had strayed into a recruiting station instead of a saloon, they might have been in France instead of Deer Island” Prison. Bates headed the Department of Correction of Massachusetts for nine years and served the Justice Department under Assistant Attorney General Mabel Walker Willebrandt, a stalwart prohibitionist.<sup>608</sup> He took pride in the state’s prison labor policies that “organized” incarceration on “an intelligent and progressive basis.” His time at the Department of Mental Diseases convinced him of the importance of “crime prevention” and the correctional system’s “adaptation” to each particular criminal’s “individual needs.” Bates began as Director of the Prison Bureau under Herbert Hoover but his penological ideas fit even better with Roosevelt. He attracted FDR’s attention as well as that of Cummings, who said he would retain Bates if he got the job of Attorney General, which happened following the death of Thomas Walsh, Roosevelt’s first choice.<sup>609</sup>

Even as Bates took pride in the carceral leviathan he helped build, he championed crime prevention and rehabilitation and engaged in radical criticism. He especially disliked pre-trial detention, having witnessed brutal and unsanitary conditions in county jails.<sup>610</sup> The problem of escape revealed Bates’s radicalism and his empathic analysis of the individual. One early 1930s proposal was to extend the heavy penalty for prison escape to those who escaped jail. Defying legal positivism, Bates opposed the proposal. The “only purpose” of pre-trial detention, Bates argued, was to ensure appearance at trial, a purpose revealed by the very existence of bail. It was the authorities’ responsibility to apprehend escapees from jail. After conviction, Bates reasoned, the sentencing judge could factor in the escape. But in the instance of acquittal, the escape caused no actionable harm. Indeed, “no one can blame” an innocent man “for attempting to escape,” and it was no “crime to have run away from a charge of which he is not guilty.”<sup>611</sup>

While empathetic for the jailed, Bates steadily stressed discipline. Although he abhorred cruelty he opposed the very idea of leniency. When President Calvin Coolidge asked how to weigh reforming prisoners against protecting society, Bates recalled himself responding, “Why not do both, Mr. President? Why not so contrive the punishment. . . that it will be both deterrent and constructive?” He saw no conflict between discipline and humanity. Prisons “need not be dirty, or lax in its discipline. . . to exercise a deterrent effect.” Punishment could purge prisoners’ “bodies. . . of disease and their minds. . . of delusions.” On the question of why the United States had so many prisoners and seemed “the most criminal nation on earth,” Bates suggested maybe it had “more crimes to commit” and that “we have carried the notion of personal liberty too far.”

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<sup>607</sup> Bates, *Prisons and Beyond*, 306.

<sup>608</sup> Bates, *Prisons and Beyond*, 3, 14.

<sup>609</sup> Bates, *Prisons and Beyond*, 5, 8, 19, 20.

<sup>610</sup> Bates, *Prisons and Beyond*, 37.

<sup>611</sup> Memorandum for Mr. Caldwell, 30 December 1933, BOPAF Box No 2, Entry 9, Correspondence, File No 4-01-9.

The common good suffered, as perhaps too many procedural “safeguards around the criminal or potential criminal [were] not in the interest of the general public.”<sup>612</sup>

Along with Bates’s leadership in the Bureau of Prisons, Roosevelt inherited other early 1930s legacies. The carceral conservatism spurred by Prohibition and Depression shaped the early New Deal, defying hopes that liquor legalization would shrink prison populations. Arrests by the Treasury Department’s Revenue Officers charged with enforcing alcohol taxation helped offset some the decarceration.<sup>613</sup> But at the federal level, traditional lawbreaking, rather than liquor, drug, Dyer, and Mann violations, drove most of the 1930s surge in imprisonment.<sup>614</sup>

The quest for order bridging the Hoover and Roosevelt administrations applied to government itself—to questions of personnel, jurisdiction, and governmental coordination. Training for guards lacked national standardization. Some fired guns recklessly, threatening inmates. One official euphemistically described a guard as “an expert marksman [who] certainly likes to shoot off firearms.”<sup>615</sup> More typically guards were caught sleeping on the job. At Leavenworth at least half a dozen snoozing guards were reprimanded from February through July 1933.<sup>616</sup> Attempts to determine territorial authority also frustrated officials. Questions arose as to whether guards could legally chase neighbors’ dogs off prison grounds and shoot them.<sup>617</sup> Questions of territorial authority even transcended vertically into airspace. At least since 1932, planes flying dangerously low troubled Fort Leavenworth officials.<sup>618</sup> In December 1933, a plane operated by the Department of Commerce and chartered by a doctor from Tulsa to fly to Rochester, Minnesota, came uncomfortably close to the ground. Prison officials, fearing the plane might drop an explosive to aid mass escape, fired on the plane.<sup>619</sup> A Commerce official defended the low flying as necessitated by bad weather. The Bureau of Prisons agreed to advise “guards [to] be more discreet in firing upon unidentified planes.”<sup>620</sup>

Early 1930s prison officials worried especially about escape and riots. The Prison Bureau, created in 1930, did not have adequate policies or legislative support in restricting contraband, which could aid escape. In 1932, Fort Leavenworth authorities discovered six revolvers smuggled in a shoe paste container. Accomplices on both sides of the law vexed prison officials. Organized crime yielded great profits that could help imprisoned associates. Prison guards also assisted in escape.<sup>621</sup> The New Dealers attempted to address these problems, which sometimes turned bloody. In November 1933, five hundred Philadelphia police helped suppress a riot in

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<sup>612</sup> Bates, *Prisons and Beyond*, 17, 27.

<sup>613</sup> Bates, *Prisons and Beyond*, 131.

<sup>614</sup> Bates, *Prisons and Beyond*, 129.

<sup>615</sup> MacCormick to Bates, 12 Jan 1933; BOPAF Box 234, 424, Dept of Justice Mails and Files Division, File No 4-2-4-0.

<sup>616</sup> Hudspeth to Ingersol, 27 Feb 1933; Hudspeth to APC Hansen, 12 April 1933; ‘Hudspeth to Clement J. Donelan, 19 April 1933; Hudspeth to Stucker, 19 July 1933; Hudspeth To HC Lucas, 29 March 1933; Husbpeth to TH Rehorn, 24 May 1933—all in BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>617</sup> Zerbst to Hammack, assistant director BoP, 20 September 1934, GC Zerbst? Warden to Director, 2 October 1934, BOPAF Box 234, 424, Dept of Justice Mails and Files Division, File No 4-2-4-0.

<sup>618</sup> Director to Gilbert G Budwig, 13 June 1932, BOPA Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>619</sup> To General Inspection Service, 4 December 1933, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>620</sup> Director to Richard S Paulett, Enforcement Section, Aeronautics Branch, Dept of Commerce, 30 December 1933, BOPAF Box 234, 424, Dept of Justice Mails and Files Division, File No 4-2-4-0.

<sup>621</sup> Bates to Attorney General, 17 March 1932, BOPAF Box 2, Entry 9, Correspondence, File No 4-01-9.



Eastern State Penitentiary.<sup>622</sup> In 1935, eleven died during escape attempts in Louisiana, along with seven in Texas, four in Mississippi, two in Alabama, and one in Arkansas.<sup>623</sup> H.R. 10640 sought to punish any individual who “instigates, connives at, willfully attempts to cause, assists in” or conspires “with any other person on persons to cause any mutiny, riot, or escape.” The legislation addressed contraband of all sorts, especially any “tool, device or substance designed to cut, abrade or destroy” the material of prison buildings, along with any “narcotic drug” or “weapon.” The bill also prohibited unauthorized correspondence between inmates and the outside.<sup>624</sup>

Other novel assets in the new war on crime helped. Among the new assets were new convicts, interstate offenders ensnared by interwar criminal codes, who proved especially useful as informants. One man called Raymond Pool, jailed in Kansas City under the National Motor Vehicle Theft Act, identified two men at Fort Leavenworth planning a prison break. Such interstate efforts typified the war on crime federalism of the New Deal and encouraged novel collaboration across agencies. The FBI’s J. Edgar Hoover kept abreast of escape plans and alerted the Bureau of Prisons to such rumors.<sup>625</sup> Cummings jealously embraced this cooperation. He considered the “relations” between the Public Health Service and the Bureau of Prisons to be “so harmonious” that he regretted the tensions arising when a warden caught a public health official with a prohibited ink pad.<sup>626</sup> A crackdown on prisons’ “almost indiscriminate” purchase of art materials “intended largely for counterfeiting,” came naturally from New Deal political economy and its vigilance against institutional lawlessness.<sup>627</sup>

Consistent with the New Deal emphasis on order and equity as twin virtues, prison officials grappled with the relationship between discipline and fairness. Bates stressed the “importance of equal treatment for all” in relieving tensions among prisoners.<sup>628</sup> It became an issue at Leavenworth, where officials hoped a “uniform rule” on personal property might minimize resentment and envy.<sup>629</sup> Particularly worrisome was the “privileged treatment” that staff rewarded some inmates.<sup>630</sup> But the remedy was elusive, since inmates could also disruptively and frivolously complain about favoritism.<sup>631</sup> For their part, guards perceived as too cruel or draconian in punishing each petty offense also frustrated order. Acting Deputy Warden Albert Singer noted that Leavenworth inmates especially disliked one guard who forbade the playing of

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<sup>622</sup> “Pennsylvania Convicts Fire Prison, Quelled,” *New York Times*, 22 November 1933.

<sup>623</sup> *Survey of Release Procedures*, Volume V, 43.

<sup>624</sup> David Caldwell to Mr. Bates, 21 December 1933, BOPAF Box 2, Correspondence, Entry 9, Folder 2.

<sup>625</sup> G.C. Zerbst to Director, 2 October 1934, Prison Bureau, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0; Memo for Director of Bureau of Prisons, J.E. Hoover, 17 Sept 1934, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>626</sup> H.S. Cumming to BoP Director, 17 March 1934, Prison Bureau, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>627</sup> Zerbst to Director, 24 Feb 1934, Prison Bureau, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>628</sup> Bates, *Prisons and Beyond*, 10.

<sup>629</sup> Robert H Hudspeth to Director, 14 Feb 1934 BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>630</sup> Director to Warden, 7 Feb 1934, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>631</sup> Zerbst to Director, 26 September 1933, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

guitar after 7:30pm, which undercut morale.<sup>632</sup> Pervasive, poorly disciplined guards and lawless brutality could upend prison tranquility.<sup>633</sup> The philosophical problem of collective punishment further posed practical obstacles to achieving order within a liberal prison state determined to lessen rather than fuel social dysfunction.<sup>634</sup>

Nothing better encapsulated the early New Deal emphasis on order than Alcatraz, the first federal civilian maximum-security penitentiary. Its symbolic significance was never lost on its architect Homer Cummings, who maximized the cultural impact of such a small fraction of America's prisoners. In August 1933, Cummings suggested a "special prison" in a remote location, perhaps in Alaska or on an island, where the most "desperate or irredeemable" prisoners could be transferred from Atlanta and Leavenworth.<sup>635</sup> He considered the Aleutian Islands and the isles off the Florida coast before settling on the coastal island.<sup>636</sup> Adopted by the Army in 1854, Alcatraz was a military prison in the Indian Wars.<sup>637</sup> Its incessant isolation promised to stop the most determined escape artists and to preclude the sort of special treatment that Al Capone reportedly received in other penal institutions.<sup>638</sup>

Cummings's special project became a symbol of his office, the modernizing Justice Department, and law and order. Judges could not sentence convicts there. Only at the Attorney General's discretion would the Justice Department transfer inmates from other federal facilities to the San Francisco penitentiary. Cummings took pride in the complicated coordination to populate the prison. Inmates, loaded from Atlanta onto a train in the middle of the night, traveled all the way to the west coast unaware of their destination. They arrived just in time for Cummings to visit in August 1934, to witness his achievement's historic commencement.<sup>639</sup>

Alcatraz captured the tension between carceral liberalism and progressive reformism. Bates was a skeptic, and its focus on the irredeemable clashed with the penology of high progressivism, shaped by social workers and emphatic practitioners. Former Berkeley Police Chief August Vollmer, well known among academic criminologists, was skeptical of incarceration in general. He thought the attempt at rehabilitating "every inmate should begin with the day that she enters the institution," with personalized attention. Even in a letter referring to the "scum of the community – the dope fiends, alcoholics, petty thieves, perverts"—Vollmer thought rehabilitation the only sensible approach and "sending a man to the penitentiary for the

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<sup>632</sup> Acting Deputy Warden Albert Singer to Robert H. Huspeth, 18 August 1933, BOPAF Box 234, 424, Dept of Justice Mails and Files Division, File No 4-2-4-0.

<sup>633</sup> Hudspeth to Director, 2 August 1933, Prison Bureau, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>634</sup> Memo of Disturbance, 22 August 1933, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>635</sup> Office memorandum to Keenan, 1 August 1933, Swisher, *Selected Papers of Homer Cummings*, 29;

Memorandum from Bates, 8 August 1933, in Swisher, *Selected Papers of Homer Cummings*, 30.

<sup>636</sup> Cummings, "Why Alcatraz Is a Success," *Colliers*, 29 July 1939.

<sup>637</sup> Bates, *Prisons and Beyond*, 143.

<sup>638</sup> In *Alcatraz: The Gangster Years*, Ward and Kassebaum write, "The root causes of these problems were lax management and a system that tolerated—even encouraged—influence peddling, the buying of favors, and other improper relations among prisoners and guards" (42–3).

<sup>639</sup> Cummings, "Alcatraz By the Men Who Made It," PHSC Box 70: Alcatraz Misc.

purpose of punishing him. . . the height of folly.”<sup>640</sup> Sanford Bates asked Vollmer for advice on personnel for Alcatraz, but recognized that the project would not appeal to him personally. This prison would house “the more difficult prisoners” and be “escape-proof if that is humanly possible,” but would not offer “great opportunity for rehabilitation work,” Bates told Vollmer.<sup>641</sup>

Aside from its carceral liberal detractors, Alcatraz entailed internal contradictions. By September 1934, its inmate population belied the image of a total system for the irredeemable. Thirty-two military prisoners remained from the island’s legacy as a military prison. Controverting Alcatraz’s supposedly absolutist founding principles, many were there for sexual offenses, both so-called deviancies and violent crimes. Sometimes officials valued them as compliant workers.<sup>642</sup> The stated rationale, however, was discipline. Of one military prisoner serving a ten-year sentence for sodomy and officially designated a “moron” who “may not have wit enough to go straight,” the records suggested “Alcatraz will do a lot to restrain him.”<sup>643</sup> Another fourteen were attempted escapees and “agitators” from McNeil Island. Eight people came from the Lorton Reformatory in Washington, DC, and seven from Leavenworth.<sup>644</sup> One man, “an agitator and trouble maker,” got to Alcatraz mainly for exclusively associating with “dangerous and bad criminals.”<sup>645</sup> Another arrived from McNeil Island where he was serving twenty-five years for postal violations, because of his propensity of “encouraging others to get in trouble while at the same time staying out of trouble himself.” As a “very desperate man” he was “willing to do anything to gain his freedom.”<sup>646</sup>

The more “hardened” criminals nevertheless bolstered the perception of, and justification for, a system of unforgiving discipline. Many high-profile offenders from the gangster panic lived in the first years of the civilian prison of Alcatraz—Al Capone himself, as well as members of the Purple Gang, the Barker-Karpis Gang, and the infamous gangs of Roger Touhy, Bugs Moran and O’Malley. They were joined by accomplices and associates of Harvey Bailey, Machinegun Kelly, John Dillinger, Baby Face Nelson, Bonnie and Clyde, Al Spencer and Frank Nash. Notorious kidnapers counted among them.<sup>647</sup> Inmates endured strict regulation—days scheduled down to the minute, with two eight-minute rest periods. Prisoners were allowed very few possessions other than toiletries and stationary and had the most restrictive visiting hours in the federal correctional system. In its first years of operations, Alcatraz utilized alcoves previously used as dungeon cells.<sup>648</sup> Throughout the decade dozens of recalcitrant prisoners found themselves in solitary confinement.<sup>649</sup>

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<sup>640</sup> Vollmer to Alicia Mosgrove, 26 March 1932, AVP Box 41; Vollmer to John G Clark, 9 January 1935, AVP Box 44.

<sup>641</sup> Sanford Bates to Vollmer, 20 November 1933, AVP Box 31: U.S. Bureau of Prisons 1929–1952.

<sup>642</sup> Ward with Kassbaum, *Alcatraz: The Gangster Years*, 81.

<sup>643</sup> Angelo Paris, No. 20, AWF.

<sup>644</sup> Ward with Kassbaum, *Alcatraz: The Gangster Years*, 81.

<sup>645</sup> William J. Simmons, No. 57, AWF.

<sup>646</sup> Harry E. Dean, No. 41, AWF.

<sup>647</sup> Ward with Kassbaum, *Alcatraz: The Gangster Years*, 81.

<sup>648</sup> Ward with Kassbaum, *Alcatraz: The Gangster Years*, 111–113, identify the tension: “When the prison was designed, it was hoped that the program at Alcatraz would simultaneously serve the purposes of internal control and external deterrence. But it soon became apparent to prison administrators that the practical concerns of running the prison were not always well served by rules rooted in the need to project a harsh image.”

<sup>649</sup> *Ibid.*, 124.

Yet Alcatraz, as the most extreme iteration of New Deal discipline, also indirectly aided rehabilitation. It served as a pressure valve for conspicuous problems in the broader system. Men attempting to escape Fort Leavenworth with smuggled firearms were transferred to Alcatraz, which Warden Zerbst said “lessened the tension greatly.”<sup>650</sup> Without Alcatraz, officials would have had a harder time maintaining the venues of more forgiving prison discipline.

In addition to Alcatraz were more subtle innovations of the early New Deal. The search for carceral order implicated prison labor, where the difference between New Deal penology and its predecessors was less sharp. Support for disciplinary labor bridged the two administrations. Legislation proposed in 1929 would “establish Federal prison camps,” which Hoover officials later considered for national forests.<sup>651</sup> They tabled the proposal, expecting a prison population reduction to follow the repeal of prohibition. Seeing prisons continue to fill, the New Dealers revived the idea.<sup>652</sup> In 1935, Bates cited the “decided upward trend” in incarceration in calling for “additional housing facilities” and “constructive means of utilizing the energies of our inmates.” Forest prison camps could mandate “a reasonable amount of work.” The Forest Service, preoccupied with Civilian Conservation Corp programs, did not fully engage the idea, but it recirculated time and again.<sup>653</sup> Serious talk about building a federal detention farm in Kentucky’s Cumberland National Forest continued through the last year of Roosevelt’s first term.<sup>654</sup>

Both administrations also took steps against private profits in prison labor, following the pattern of New York and other states that had led such reform efforts since the 1880s abolition of the contract labor system. President Herbert Hoover’s Reconstruction Finance Corporation (RFC) imposed restrictions and the Hawes-Cooper Act, prohibiting the sale of prison goods on the open market, passed in 1930 and went into effect in 1934. As many prison industries closed, states scrambled to reorient operations toward state-use. The Roosevelt administration sought to harness this energy for reform while affirming the disciplinary function of prison labor. In the early New Deal, the principles affirmed by the RFC and the Hawes Cooper Act carried forward in the National Industrial Recovery Act. The Prison Labor Authority’s commercial codes encouraged new prison labor standards across the states. The Ashurst-Sumners Act of 1934 imposed criminal penalties on the illegal interstate transfer of prison goods. The Ulmann Committee, named after Joseph N. Ulman and including criminologist Frank Tannenbaum, pressed the National Industrial Recovery Board (NIRB) to support aid to states for the transition to state-use.<sup>655</sup> The Supreme Court repudiated the NIRB and so Roosevelt, urged to carry the

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<sup>650</sup> G.C. Zerbst to Director, 2 October 1934, BOPAF Box 234, 424, Dept. of Justice Mails and Files Division, File No 4-2-4-0.

<sup>651</sup> J.V. Bennett to W.L. Rumble, 1 November 1932, BoP Admin Box 1: Prisoners and National Parks.

<sup>652</sup> For the PIRA’s intersection with New Deal criminology, “New Deal Criminology,” chapter 3 of this dissertation. A fair amount is written on the PIRA. See Matthew Pehl identifies a core tension in New Deal penal reform as the role of labor in the mixed economy in “Between the Market and the State: The Problem of Prison Labor in the New Deal,” *Labor: Studies in Working-Class History*, Volume 16, Issue 2 (2019): 77–97.

<sup>653</sup> Director to Chief of the Forest Service, 9 April 1935, Prisoners and National Parks, BOPAF Box 1.

<sup>654</sup> Memorandum for the Files, 24 August, 1936, Prisoners and National Parks, BOFAF Box 1.

<sup>655</sup> Frank T. Flynn, “The Federal Government and the Prison-Labor Problem in the States,” *Social Service Review* 24, No. 2 (Jun 1950): 213-236, 216-228.

state-use mission forward, issued an order in September 1935.<sup>656</sup> This order created the Prison Industries Reorganization Administration (PIRA), led by a board of his choosing, to perform studies and investigations, recommend appropriate projects for prison labor, and suggest “loans or grants” to state governments.<sup>657</sup>

PIRA revealed both the opportunity and challenge of making national policy. On the one hand, mobilization appeared to link both administrations grappling with long-term problems exacerbated by the Depression. But, on the other hand, Roosevelt’s national ambition went further to reveal the delicate navigation that federalism required. For the next two years PIRA surveyed prison industries and offered recommendations for state-level reform. With a small budget, a couple dozen personnel, and limited authority, PIRA was frustrated when Congress ignored requests for more aid to states.<sup>658</sup> PIRA had to rely on coordination with federal agencies like the WPA, the Bureau of Labor Statistics, and the Public Health Service, for both information and funding. PIRA also recognized it could not force its way on states, and so its “board decided to operate only in states from which the invitations were extended through governors.”<sup>659</sup>

Yet this consensual arrangement, acknowledging each state’s particular needs and each governor’s authority, likely strengthened relations across jurisdictions. By May 1937 PIRA could report serious interest from seventeen states, plus the District of Columbia. The collaboration boasted great geographical diversity. In the northeast and adjacent to the nation’s capital, PIRA had a foothold in Delaware, Maryland, Pennsylvania and Vermont. Into the heartland and in the South, it found a welcome reception in Arkansas, Georgia, Indiana, Kentucky, Tennessee and West Virginia. PIRA also found inviting authorities further west—in California, New Mexico, Oklahoma, Oregon, Texas, Utah, and Wyoming.<sup>660</sup> In 1937, as Gustav Peck, on behalf of PIRA, urged Congress to extend funding to the states and expressed concern about the “dangerous” rise of prison idleness, he hailed PIRA’s “lifting of states with the lowest standards to a better level, and the willingness of these states to adopt systems of rehabilitation.”<sup>661</sup>

Not only did it observe the subsidiarity and diversity of states, the advisory arrangement gave PIRA the voice to articulate a particularly bold vision. Recognizing the “widespread opposition to the use of prisoners on road work,” tainted by the “unsavory reputation of the chain gang,” PIRA nevertheless championed the “extensive opportunity for the wise and constructive use of prisoners for the better types of highway work, and on conservation work such as forestry, drainage and soil erosion projects.”<sup>662</sup> PIRA recognized that “[p]ublic indignation at the brutal treatment of prisoners” under convict lease had led to its abolition, but it highlighted the need for hard labor. Finding good work for prisoners was always a “difficult task” for penal administrators, and state-use would “not alone solve the problems of idleness.” PIRA called for more consideration of prison labor on “public roads, farms, forestry and soil conservation

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<sup>656</sup> PIRA Progress Report, 15 May 1937.

<sup>657</sup> Executive Order: Establishment of the Prison Industries Reorganization Administration, No. 7194, 26 Sept 1935.

<sup>658</sup> Frank T. Flynn, “*The Federal Government and the Prison-Labor Problem in the States*,” *Social Service Review* Vol. 24, No. 2 (Jun 1950): 213–236, 216–228.

<sup>659</sup> PIRA, Progress Report, 15 May 1937, 6.

<sup>660</sup> PIRA, Progress Report, 15 May 1937, 6.

<sup>661</sup> Gustav Peck, “The Prison Labor Situation,” *Proceedings of the Annual Congress of the American Prison Association 1937* (1937): 237–239, 237.

<sup>662</sup> PIRA, Progress Report 15 May 1937,

projects for the benefit of the state.”<sup>663</sup> While PIRA had origins in northeastern labor activism and pre-New Deal national policies, its distinctive contribution to carceral liberalism was the successful navigation of federalism to advance a national disciplinarian vision and legitimize national carceral power.

### The Vindication of Reform

The Roosevelt administration embraced its leadership role over state carceral policy not only on labor but also on rehabilitation. The Survey of Release Procedures, an unprecedented national effort to examine such mechanisms as parole, probation, and pardon, was the first attempt to comprehensively study the states’ prisons as well as their regimes of release. It was also the New Deal’s most serious contribution to the philosophical defense of rehabilitation. Cummings feared the public backlash against the rise of parole and probation, and thought information the best response.<sup>664</sup> In January of 1935, the attorney general declared it time “for a nation-wide examination” of release, an issue “vitally related. . . to the proper administration of criminal law throughout the country.”<sup>665</sup> Although the early 1930s nurtured a short-term carceral conservatism, Cummings’s Justice Department eyed the long-term. Its Survey authors celebrated the sweep of institutional evolution, reaching back to 1790 when incarceration displaced corporal punishment, “the most revolutionary step in the whole history of punishment for crime.”<sup>666</sup> The Survey situated itself at the tail end of four major historical phases—the prison system of the new republic through 1830, the domination of the Pennsylvania and Auburn systems from 1830 to 1870, the reformatory system from 1870 to 1900, and an era stretching from 1900 to 1935 characterized as “custodial, punitive, and industrial.” Beyond driving out private profits, the impulse to reform sought to augment the reliance on custody with the strategic employment of release.<sup>667</sup>

The Survey was also a paradigmatic program of the New Deal, however narrowly defined, with short-term goals of political economy. Its funding came from FDR’s authorization of various work projects in November 1935. The president instructed Treasury Secretary Henry Morgenthau to earmark \$14,112,442 from the Emergency Relief Appropriation Fund for the purpose of hiring “white-collar” workers off the relief rolls. Out of this fund of fourteen-million dollars, a sum of \$1,424,298—over ten percent—was set aside for the “Survey of Methods of Dealing with Persons Found Guilty of Crime.” Immediately a fourth of the money went to individual states.<sup>668</sup> Later, funds would flow to the state administrators who answered to state and regional directors.<sup>669</sup> Future funding would have to disburse through the Works Projects

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<sup>663</sup> “Laws Affecting the Labor of Prisoners and the Sale and Distribution of Prison-Made Products in the United States,” 1, 8, in PIRA, Bulletin No. 1, in AG Advisory, Box 16.

<sup>664</sup> As the final product indicated, the effort came “in response to an increasing volume of protest against the use of parole.” *Survey of Release Procedures*, Vol. I, vii.

<sup>665</sup> From the Journal of Criminal Law and Criminology, March 1936 Federal Survey, January 7 1935, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee.

<sup>666</sup> *Survey of Release Procedures*, Vol. V, 9.

<sup>667</sup> *Survey of Release Procedures*, Vol. V, 2–5, 29, 30.

<sup>668</sup> Miller to Will C. Metz, State Administrator, WPA, 31 January 1936, AGSRP GC, 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>669</sup> Sanders to Burgess, AGSRP GC, 1925–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

Administration, which also supplied the labor. The project thus united New Deal labor and criminal justice policy across national agencies. While announcing Dr. Barkev Sanders as the Survey's Technical Director, Cummings highlighted both main purposes—the WPA goal “to employ white-collar workers now on relief” as well as the DOJ goal to “study of methods of releasing prisoners from courts and penal institutions.”<sup>670</sup>

If the WPA goal was employing labor, and the Justice Department's goal was comprehension, the Survey in practice served a significant diagnostic function for federal leadership.<sup>671</sup> Although its ambitions suggested an indispensable federal role in shaping the national conversation, the Survey effectively elevated the states as policy models and intellectual resources. This federal humility sought a collaborative relationship more promising than conquest or the rivalrous federalism of previous eras. Despite tensions between the New Deal bureaucracies and between the national and state governments, the cultural project of vindicating reform, done “in a spirit of experimentation,”<sup>672</sup> proved a constructive test of collaboration across centers of authority.

As with New Deal criminology, Cummings entrusted Justin Miller with this project of New Deal penology. Miller, former dean at Duke Law School, was Cummings's appointed head of the Attorney General Advisory on Crime, which sought to lead the intellectual community in understanding the contours of criminology and to create a “crime prevention” bureau.<sup>673</sup> Miller emphasized redemption and welfare over pure repression. He narrowly interpreted a policy barring sentenced convicts from the Civilian Conservation Corps camps so as to permit juvenile offenders.<sup>674</sup> Miller had hopes that “public opinion” would support “developing a well-rounded program of crime control.”<sup>675</sup> Like Cummings, Miller championed preventive crime control and wished to defend rehabilitation against a skeptical public “At a time when so much emphasis is being given to the repressive phases of crime control,” Miller was optimistic that the rehabilitative aspects also appealed to many Americans.<sup>676</sup>

The study's breadth matched its intellectual and cultural ambition. Within eleven geographical regions the Justice Department examined eighty-eight state prisons and reformatories with personal visits to eighty-two. The studied releases occurred in the eight years

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<sup>670</sup> To Whom It May Concern, 16 May 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>671</sup> The explorations of political scientist James C. Scott into the nation-state's search for sociological legibility has likely influenced this section in implicit ways. See James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998). For a look at the U.S. federal government's 20<sup>th</sup> century attempts to understand the nation in the context of miscegenation law, see Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* (Oxford and New York: Oxford University Press, 2009).

<sup>672</sup> *Survey of Release Procedures*, Vol. I, v.

<sup>673</sup> See “New Deal Criminology,” chapter 3 of this dissertation.

<sup>674</sup> He reasoned that even the subset of juvenile courts that qualified as criminal courts effectively suspended the sentences of boys put on probation—and since these convicted juveniles were not technically “serving sentence” they “should not be excluded.” Miller, Memorandum for Assistant Solicitor General Golden W. Bell, 29 January 1936, Report from Francis H. Hiller, Field Director of National Probation Association, “Probationers in CCC Camps,” AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>675</sup> Miller, Memorandum for the Attorney General, 10 October 1936, AGSRP GC Box 1, Entry 422: Advisory Committee.

<sup>676</sup> Miller, Memorandum for the Attorney General, 10 October 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

from 1928 through 1935. The regional directors' staff conducted investigations and statistical supervisors compiled data.<sup>677</sup> The Survey aimed to create a comparative digest of state-level policy, a compilation of census infrastructure, a case history of data analysis of the relationship between offense and release, an analysis of successful discharges from parole, an outline of the tentative standards for probation work, and an evaluation of the efficacy of release methods. The data would optimally allow a "prediction study"—one that could make policy forecasts, rather than a mere "statistical study" explaining recent trends.<sup>678</sup>

Yet a humility toward immediate policy reform accompanied, or even derived from, the intellectual ambition. Miller urged against voicing "suggestions for improvement as applied to any particular state system."<sup>679</sup> The Justice Department would not issue specific proposals, and the advisory committee was instructed to maintain public silence about recommendations before final publication.<sup>680</sup> Tempted to comment on policies in transformation, Howard Gill, one of the Survey's authors, pondered giving suggestions on target numbers of parolees and psychiatric care needs.<sup>681</sup> Sanders warned against giving opinions on optimal parolee numbers so as to avoid "snap judgments and broad generalizations" and provoking the jealousies of the Prison Reorganization Board.<sup>682</sup> Despite the policy of reticence, Cummings's aspirations reverberated in internal discussions. Cummings was hardly alone in hoping the data would shape debate. Circuit Judge Joseph H. Hutchinson hoped to defeat "outmoded social and legal views" and support the "substitution throughout the criminal law of a socially correctional for the revengeful point of view."<sup>683</sup> After mastering the immediate questions, some hoped to extend the inquiry to such issues as the "penal colony question."<sup>684</sup>

As the criminological community recognized, a comprehensive digest, statistical analyses of releases and convictions, and predictive capacity all required massive data.<sup>685</sup> Data collection and analysis in turn required expertise. The Survey's advisors included penological heavyweights—Thorstein Sallin, Edwin Sutherland, Joseph Keenan, and the head of the Federal Board of Parole, Arthur D. Wood.<sup>686</sup> Ideally, regional supervisors would have graduate-level training and basic competence in many areas—correctional institutions, probation law, custody practices, management principles, architectural and personnel requirements, classification techniques, medical services, psychiatry, education, employment, recreation, religion, and moral training. A

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<sup>677</sup> *Survey of Release Procedures*, Volume I, xi.

<sup>678</sup> *Survey of Release Procedures*, Volume I, viii, xi.

<sup>679</sup> Miller to Philip A. Parsons, 9 October 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>680</sup> Miller Memorandum for Mr. Bates, 22 May 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee.

<sup>681</sup> Howard B. Gill to Miller, 2 April 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee

<sup>682</sup> Barkev S Sanders, Memorandum for Mr. Justin Miller, 7 April 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee

<sup>683</sup> Joseph C. Hutcheson, Circuit Judge, 7 January 1936 to Cummings, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>684</sup> Miler, Memorandum for Bates, 9 January 1936; Director Bates, Memorandum for Mr. Justin Miller, 3 January 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum.

<sup>685</sup> From the *Journal of Criminal Law and Criminology*, March 1936, Federal Survey, On January 7 1935, AGSRP GC, 1925–1938, Box 1, Entry 422: Executive Committee

<sup>686</sup> Advisory Committee: Attorney General's Survey of Release Procedures, 1 December 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Advisory Committee.



supervisor would optimally possess that intangible alacrity, that sense of “what constitutes a good indeterminate sentence and parole law.”<sup>687</sup>

But beyond the small stable of experts, driven to shape national debate, institutional realities asserted themselves. The intellectual object had to contend with the New Deal goals of fostering bureaucratic coordination and serving labor priorities. One of the Survey’s attractions, and a challenge, was the prospect of wrangling the increasingly complex thicket of federal and state authorities invested in questions of release. From the outset, interagency collaboration offered inspiration. Cummings’s crime conference in December 1934 highlighted the national drive for understanding release. Ray Huff, parole executive of the Bureau of Prisons, pressed for a federal study.<sup>688</sup> In planning the Survey, Miller understood he needed cooperation from wardens and superintendents.<sup>689</sup> In considering taking over the space recently vacated by the defunct National Recovery Administration, Miller underscored the goal of collaboration across the New Deal state.<sup>690</sup>

Miller also considered PIRA member Louis N. Robinson for the Survey advisory committee, which revealed the potential for redundancy and uncertainty.<sup>691</sup> PIRA’s work overlapped with the Survey’s but it had a distinct mission—to remove private profits from prison labor. Its president, in correspondence with Justin Miller, admitted that in contemplating all these investigatory efforts, he could not “even pretend to know what the President’s intentions may be.”<sup>692</sup> Lofty talk of coordination sometimes fed misunderstanding. Thanks to Miller’s other work, one senator conflated the Survey of Release Procedures with the “Crime Prevention Bureau,” which did not exist, although “the assumption” that it did amused Miller.<sup>693</sup> An American Prison Association representative admitted to finding “it difficult to keep up with the identity of the alphabetical parade and the various groups coming into the now popular field of crime treatment.”<sup>694</sup> After a long national neglect of penology, a host of sometimes redundant bureaucracies now threatened to entrench confusion.

Bureaucratic constraints coming from the top also frustrated coordination. Moving the northwest region’s headquarters from Seattle to Portland required approval. The president had to authorize some funding requests.<sup>695</sup> National authorities expressed skepticism about the extent of information gathering. They wanted to avoid duplication with the state WPA and Treasury

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<sup>687</sup> Memorandum for Mr. Miller, 5 December 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum

<sup>688</sup> Sanders, Memorandum for Mr. Miller, 28 Jan 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum.

<sup>689</sup> Miller, Memorandum for Mr. Bates, 2 June 1936, RG 60: AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum

<sup>690</sup> Memorandum to Mr. Justin Miller, 10 February 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Advisory Committee.

<sup>691</sup> Miller, Memorandum for Mr. Brien McMahon, 12 December 1935, AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum

<sup>692</sup> Joseph N. U. to Miller, 16 November 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Conference – Attorney General’s Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>693</sup> Miller, Memorandum for Mr. McMahon, 20 February 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>694</sup> To Miller, 14 November 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Conference–Attorney General’s Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>695</sup> Gill to Miller, 19 March 1936, AGSRP GC, 1925–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

records.<sup>696</sup> Irving W. Halpern was struck by the demands of case history.<sup>697</sup> Justice officials voiced concerns to the Census Bureau about “inherent dangers” of entrusting intimate details to precinct captains, giving them “tremendous power for oppression” and equipping them for “extortion and blackmail.”<sup>698</sup>

National geography also posed challenges. The pretense of a national effort attracted those who professed knowledge of the hinterlands. George T. Scully, the Supervisor of Paroles for Illinois’s Department of Welfare, drawn by the \$1.2 million budget, cited his knowledge of middle America in hoping to participate.<sup>699</sup> The East Coast nevertheless dominated. Howard Gill lamented that fifteen of eighteen prospective members lived east of the Alleghany Mountains, noting that “the mid-western and the western states feel very strongly about the question of representation on such national programs as this.”<sup>700</sup>

Cooperating with the states introduced both opportunities and frustrations. About half the states were already studying crime and avoiding extraneous data compilation itself made extra work.<sup>701</sup> States varied in their eagerness to cooperate. Representative Ray Huff, sent by the Justice Department to promote the Survey, impressed Oregon officials.<sup>702</sup> But others feared federal domination. One state board insisted on many conditions—that it approve all personnel and scheduling, that no records leave the office, and that the board could “terminate the study if for any reason it so desires.”<sup>703</sup> Privacy concerns also arose at the state level. Allowing WPA workers to have parole records would be a “breach of confidence.”<sup>704</sup> State officials balked at handing over “confidential” case history.<sup>705</sup>

Ultimately, the Survey’s most important limits came from the bureaucratic reality of the New Deal state, its philosophical program, and its plans for political economy. The important policy goals for labor sometimes clashed with Cummings’s and Miller’s cultural goals. Funding came through the Emergency Relief Appropriation Acts of 1935 and 1936 and with the requirement that WPA workers do most of the work, a priority Miller and Cummings acknowledged. Within the logic of WPA funding, the Survey was subordinate.<sup>706</sup> The WPA set labor guidelines for its

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<sup>696</sup> Irving W. Halpern to Miller, 6 November 1936, AGSRP GC, 1935–1938, Box 5, GC 1935–1938, Travel–Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>697</sup> Irving W. Halpern to Miller, 6 November 1936, AGSRP, GC, 1935–1938, Box 5, GC 1935–1938, Travel–Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>698</sup> Memorandum for the Attorney General, 15 February 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Advisory Committee.

<sup>699</sup> George T. Scully, Dept. of Public Welfare, Illinois, 16 December 1935, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee

<sup>700</sup> Howard B. Gill to Miller, 4 March 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>701</sup> Technical Director, Memo for Miller, 7 January 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>702</sup> Wayne L. Morse, Memorandum for Mr. Ray Huff, 10 February 1937, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>703</sup> H.C. Stout to Berkev S. Sanders, 13 November 1936, AGSRP GC, 1935–1938, Box 5, GC 1935–1938, Travel–Works Progress Administration, Entry 422: Folder: Works Progress Administration

<sup>704</sup> Leore Sterle to George F. Ames, 5 October 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>705</sup> Irving W. Halpern to Miller, 6 November 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>706</sup> Attorney General to Ray L. Huff, 2 December 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Advisory Committee; Miller to William B. Cox, 30 January 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee; Attorney General To Whom It May Concern, February 1936, AGSRP GC, 1925–1938, Box 1, Entry

“security wage workers.”<sup>707</sup> But the WPA faced its own constraints. It had to balance comprehension and federalism, aiming to maintain “maximum of employment in all localities” while accommodating “flexibility in state plans.”<sup>708</sup> These constraints in turn afflicted the Survey, which Miller confirmed would conform to WPA standards.<sup>709</sup>

WPA priorities immediately complicated the Justice Department’s vision. Budgetary conflicts burdened the project without relent.<sup>710</sup> Money allocated in 1935 had to be spent by the next June, which gave insufficient time, so Justice officials gambled on securing more funding as they went.<sup>711</sup> Funding did not cover state supervisors, but only regional directors and field supervisors.<sup>712</sup> Despite allowing some flexibility—transportation and relief personnel accounting for five percent of original allotments could be transferred—WPA rigidity clashed with the Justice Department’s desire for improvisational freedom.<sup>713</sup> Justice officials were used to shuffling funding for day-to-day operations, but WPA rules precluded funding for “routine departmental tasks” like clerical help.<sup>714</sup> Joseph Keenan was barred from moving Helen Fuller from the Lands Division and on to the Survey Payroll.<sup>715</sup> The WPA urged tight work schedules, which Miller preferred to consider “suggestive.”<sup>716</sup>

More fundamentally, WPA’s labor priorities conflicted with Justice’s intellectual aspiration. Criminologist Sheldon Glueck declined an invitation to advise the Survey, doubting the value of “‘research’ in these technical fields” in the hands of “an army of the unemployed.”<sup>717</sup> Miller saw an upside to high-profile “critical comment,”<sup>718</sup> but overall shared Glueck’s bias for elite

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422: Memorandum; The “Survey of Methods of Dealing with Persons Found Guilty of Crime” was merely item number seven out of Appropriation number 665035, the category of Works Progress Administration (WPA) emergency relief for “Educational, Professional and Clerical Persons, 1935–37.” Bartelt to Miller, 22 January 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Memorandum.

<sup>707</sup> Administrative Order No. 52 of the Works Progress Administration, Regulations Relating to Monthly Earnings, Rates of Pay, Hours of Work, and Conditions of Employment, AGSRP GC, 1925–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>708</sup> Works Progress Administration, Operating Procedure No. W-9, 11 March 1937: Organization, Administration, Supervision and Operation of the Education Program, AGSRP GC, 1925–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>709</sup> Miller to Corrington Gill, 20 February 1936, AGSRP GC, 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration

<sup>710</sup> Miller, Memorandum for the Attorney General, 18 November 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>711</sup> Miller, Memorandum for Brien McMahon, 19 December 1935, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>712</sup> Miller, Memorandum for Mr. McMahon, 25 January 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum

<sup>713</sup> Gill to Miller, 18 February 1936, AGSRP GC, 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>714</sup> Sanders, Memorandum for Mr. Justin Miller, 19 December 1935, AGSRP GC, 1935–1938, Box 1, Entry 422: Executive Committee

<sup>715</sup> Memorandum for Joseph B Keenan, 6 February 1936, RG 60: AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>716</sup> Miller, Memorandum for Mr. Gordon Dean, 6 February 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Memorandum.

<sup>717</sup> Glueck to Miller, 6 January 1936, AGSRP GC, 1925–1938, Box 1, Entry 422: Advisory Committee.

<sup>718</sup> Miller, Memorandum for the Attorney General, 10 January 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

expertise.<sup>719</sup> Miller even mused that moving \$25,000 from relief workers to administration would cause “no harm,” while moving that or “any other amount” in the other direction would “cripple us very, very seriously.”<sup>720</sup> Not wanting to rely only on WPA workers, whom he called “very short of the class of employees necessary,” Miller and Justice Department officials began asking for exemptions from WPA rules.<sup>721</sup> Sanford Bates, meanwhile, did not want probation officers involved as paymasters, and in fact thought the WPA should manage the task.<sup>722</sup>

Miller’s skepticism toward WPA workers tested his relations across national agencies. Along with Sanders, Miller wanted to fingerprint everyone on the relief rolls, since criminals could not work a survey that “relates to criminal justice.”<sup>723</sup> At first J. Edgar Hoover balked at having the FBI administer this, so the Justice Department relied on local police. Eventually Hoover came around.<sup>724</sup> Despite initial difficulties, the Survey thus advanced the type of cooperation on which the war on crime coalition relied.

Ominous financial precariousness also tested relations across agencies. In June 1936, Corrington Gill requested that \$900,000 be returned to the WPA, which would disperse funds as needed.<sup>725</sup> Cummings asked Harry Hopkins for a written record for the transfer.<sup>726</sup> In late summer, Bates was reluctant to request an extension.<sup>727</sup> Cummings intervened, stressing to Gill the economic importance of the project. Crime was economically harmful and “more adequate criminal statistics” could help combat the “growing public sentiment against parole and probation.” Seventy-three percent of the funds would go to relief workers, he reminded Gill.<sup>728</sup> The plea worked, and the 1936 Emergency Appropriation Act rescued the Survey.

But the Survey fell behind schedule. Disparities across WPA guidelines for workers’ hours, new reductions in hours, confusing WPA rules, and a mix of “unpredictable circumstances” caused delays. The initial budget allowed relief workers to work 166.6 hours, which was later trimmed to 140 hours and then in late 1936 down to 96.<sup>729</sup> Quarantines and prison riots also slowed things down.<sup>730</sup> In the Midwest, both Michigan and Illinois suffered delays in their survey work.<sup>731</sup> In November, Stuart Rice, the Acting Chairman of the WPA’s Coordination

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<sup>719</sup> Homer Cummings, Memorandum for the Attorney General, 14 February 1936, AGSRP GC, 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>720</sup> Miller, Memorandum for Assistant Solicitor General Golden W. Bell, 29 January 1936, Report from Francis H. Hiller, Field Director of National Probation Association, “Probationers in CCC Camps,” AGSRP GC 1935–1938, Box 1, Entry 422: Memorandum.

<sup>721</sup> Edmund A Clune, Memorandum for Mr. Miller, 14 January 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Memorandum.

<sup>722</sup> Memorandum for the Attorney General, 6 January 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>723</sup> Miller, Memorandum for the Assistant to the Attorney General, 5 March, 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Memorandum; Justin Miller to Miss Hilda Johler, 9 October 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>724</sup> Miller to Cummings, 21 September 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>725</sup> Memorandum for the Records, 18 June 1936, AGRSP GC 1935–1938, Box 1, Entry 422: Executive Committee.

<sup>726</sup> Attorney General to Hopkins, 3 June 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee

<sup>727</sup> Report on the Executive Committee Meeting, 3 June 1936, AGSRP GC 1935–1938, Box 1.

<sup>728</sup> Attorney General to Gill, 21 July 1936, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>729</sup> My Dear Mr. Hopkins, 15 December 1936, AGSRP GC 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>730</sup> Miller to Stuart Rice, 17 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>731</sup> Meeting of the Exec Committee, 14 May 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee

Committee of the Central Statistical Board, warned Miller that time was short.<sup>732</sup> Miller complained about budgeting restrictions. He wanted to hire Wayne Morse, an Oregon law professor, but he could not take the job for \$3,600.<sup>733</sup> Miller also identified problems with state-level cooperation, a function of “political considerations.” State governments, suspicious of federal motives, were “almost invariably. . . horrified that these records were to be placed in the hands of relief workers.” Survey workers often had to work on site.<sup>734</sup>

The Survey leaders had to lower their expectations. Cummings told Honorable J.B. Poindexter, who hoped the project could come to Hawaii, that the project was already overextended.<sup>735</sup> The original draft of a questionnaire now seemed “too large and complex,” forcing wardens to answer questions beyond their ken and yielding answers unsuited for statistical analysis.<sup>736</sup>

The Survey suffered budgeting and coordination problems from top to bottom. By the end of 1936 the executive committee conferences became affected. Miller called a conference for November on short notice, hoping to attract experts from across “the various fields of crime control and prevention.”<sup>737</sup> Scheduling conflicts hurt attendance. The Executive Committee of the Prison Association of New York was holding a long-planned meeting in Philadelphia that same weekend.<sup>738</sup> Austerity contributed to the embarrassments. Reimbursements proved difficult.<sup>739</sup> The conference could not reimburse air travel, which discouraged attendees from the west.<sup>740</sup> They could not afford to publish proceedings.<sup>741</sup> Tight budgets reduced the next conference, two days after Christmas in Chicago, to a dinner affair with limited reimbursements.<sup>742</sup>

From the bottom, labor conditions threatened revolt in 1936 and 1937. Some workers’ grievances mirrored Miller’s own desire for more flexibility. Miller wanted maximum salary exemptions to accommodate a “supplementary payroll.”<sup>743</sup> Administrative workers wanted the

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<sup>732</sup> Stuart Rice to Miller, 9 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>733</sup> Miller to Stuart Rice, 17 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>734</sup> Miller to Stuart Rice, 17 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>735</sup> Attorney General to Honorable J.B. Poindexter, 7 December 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Advisory Committee.

<sup>736</sup> Memorandum for Mr. Justin Miller, 7 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee.

<sup>737</sup> Miller to Bates, 11 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Conference–Attorney General Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>738</sup> To Miller, 14 November 1936; Miller to Boach, 11 November; Miller to Bechkham, 11 November 1936; Miller to Best, 11 November 1936; Miller to Coy, 11 November 1936; Miller to Hannan, 16 November 1936; Miller to Treusdel; Miller to Laune, 11 November 1936—all in AGSRP GC 1935–1938, Box 1, Entry 422: Conference–Attorney General’ Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>739</sup> Kavanaugh to Miller, 6 January 1937, AGSRP GC 1935–1938, Box 1, Entry 422: Conference – Attorney General Survey November 19<sup>th</sup> and 20<sup>th</sup>; Miller to John L Gillin, 2 December 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Conference – Attorney General’ Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>740</sup> Miller to Roy Best, 16 November 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Conference – Attorney General’ Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>741</sup> Miller to Paul L Schroeder, 22 December 1936, AGSCRPG GC 1935–1938, Box 1, Entry 422: Conference – Attorney General’ Survey November 19<sup>th</sup> and 20<sup>th</sup>.

<sup>742</sup> Miller to John J Hannan, 21 December 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Chicago Conference December 27, 1936.

<sup>743</sup> Petition to the Federal Works Progress Administration, AGSRP GC 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration

annual leave and vacation days afforded to similar workers in other government jobs.<sup>744</sup> Sanders and Millers recognized that restrictions on leave would undercut morale.<sup>745</sup> Miller told Cummings he worried that planned hours reductions might inspire “radical elements within the labor group.”<sup>746</sup> Workers complained about payday inconsistencies, lunch times, and night shifts. They wanted work more clearly classified according to their tasks and more transparency in promotion.<sup>747</sup> In 1937, junior coders, card and key punchers, calculator machine operators, tabulating machine operators, and editors made 60 cents per hour, while their senior counterparts made between 76 and 80 cents—26.7% or 33.3% more.<sup>748</sup> Some workers demanded pay commensurate with the work they were already doing. One chapter of the Workers Alliance demanded more clearly delineated pay brackets and a third-party arbiter from the National Labor Relations Board to adjudicate disputes.<sup>749</sup> The Workers Alliance also decried “unfair discrimination based on race, color, creed, political, fraternal or other such classification,” and worried that “negro workers cannot qualify for certain higher classifications.”<sup>750</sup> Black workers demanded access to the Department of Justice restrooms of their choosing, and to the cafeteria.<sup>751</sup> One worker, Orval Miller, demanded back pay for work beyond his pay schedule, a difference between \$58 and \$72 per month. Although his supervisors took his grievances seriously, Sanders dismissed him as a “shyster and chiseler,” according to Morse.<sup>752</sup>

In the scramble to salvage the Survey in 1937, new challenges emerged. Justin Miller stepped down in February to join the U.S. Court of Tax Appeals.<sup>753</sup> To ensure the first volume was “thorough and scholarly,” Morse urged a strict budget.<sup>754</sup> In February 1937 Morse urged Cummings for more help and a larger staff. The July 1 deadline, he explained, was unrealistic, as

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<sup>744</sup> Emerson Ross to Miller, 21 April 1936, AGSRP GC 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration

<sup>745</sup> Clune, Memorandum for Mr. Miller, 7 January 1936, AGSRP GC 1935–1938, Box 1, Entry 422: Memorandum

<sup>746</sup> Memorandum for the Attorney General, 10 December 1936, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>747</sup> Morse to Ray Cooke, National Secretary, 10 March 1937, AGSRP GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration; The Arbitration Board, 28 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>748</sup> S.A. McIntosh to Wayne L. Morris, 2 June 1937, AGRSP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>749</sup> Minutes of Executive Meeting, 18 April 1936, Workers Alliance Local 3, Chairman David Dixon Presiding, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration; Ray Huff and David Dixon to Benedict Wolfe, 25 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>750</sup> The Arbitration Board, 28 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>751</sup> Morse to David Dixon, 17 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration; Morse to David Dixon, 17 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration

<sup>752</sup> Morse to David Dixon, 17 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration

<sup>753</sup> Dear Mr. Hopkins, 3 February 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>754</sup> Morse to Bennett 4 February 1937, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee

Harry Hopkins needed to understand.<sup>755</sup> The academic cycle proved a challenge, as it did the year before. In the fall, two professors working on the project had to return to their jobs.<sup>756</sup> Ultimately the Survey had to cut costs. Survey leaders considered having Leavenworth prisoners do the printing, and meanwhile in 1937 the Committee was still considering the formatting of the manuscript.<sup>757</sup> They held out hope the WPA would fund the printing.<sup>758</sup>

By March 1937 dramatic cuts required a reduction in field work. The progress did not satisfy the Coordinating Committee.<sup>759</sup> In April the executive committee created a new schedule, planning to liquidate statistical units by April 17 and to work on coding and editing until June 40. If the funding stopped, the contingent plan was to furnish data to the universities.<sup>760</sup> WPA worker requirements continued to cause frustration. The Survey could not cut field workers without cutting administrative staff. Survey leaders approached Hopkins for exemptions on these regulations, which created friction as to who would take responsibility.<sup>761</sup>

Cummings again intervened. He addressed Stuart Rice, the Acting Chairman of the Coordinating Committee of the Central Statistical Board of the Works Progress Administration, and reminded him that for two years the Justice Department had accommodated bureaucratic requirements. Cummings had approved and submitted the basic outline to the Emergency Council on August 24, 1935, and emphasized he wanted “substantially complete control.” The Coordinating Committee recommended that the WPA cooperate. Cummings noted that the “assumption” was that “sufficient extensions of time and funds would be made to permit” the project to finish, and that administration would get some funding, despite the WPA’s labor priorities. Cummings said the challenges were predictable—particularly the lack of uniformity among states. But Rice urged major changes to the breadth of the program. Cummings said they operated on the assumption that the WPA would approve exemptions for funding, and stressed that they could not close the field units by April 17.<sup>762</sup>

The Survey made progress even as its scope receded. As of mid 1937 the Survey had preliminarily studied nine thousand federal parole outcomes.<sup>763</sup> In July, under pressure to wind

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<sup>755</sup> Wayne Morse, Memorandum for the Attorney General, 1 February 1937, AGSRP GC 1935–1938, Box 1, Entry 422: Attorney General.

<sup>756</sup> Report of the Executive Committee: Suggested Plans for the Preparation and Publication of the Reports on the Legal and Administrative Phase of the Survey of Release Procedures, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>757</sup> Henry Weihofen and Paul E Raymond, Memorandum for the Executive Committee and the Attorney General, 26 March 1937, AGSRP GC, 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee

<sup>758</sup> Meeting of the Executive Committee, 15 June 1937, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>759</sup> Morse to Rice, 20 March 1937, AGSRP GC 1935–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>760</sup> The Executive Committee (Miller, McMahon, Bennett, Bixby): Memorandum to Dr. Rice, 7 April 1937, AGSRP GC 1925–1938, Box 5, GC 1935–1938, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>761</sup> Meeting of the Exec Committee and the Coordinating Committee Held Thursday, 1 April 1937, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee.

<sup>762</sup> Attorney General to Dr. Stuart Rice, 10 April 1937, AGSRP GC 1935–1938, Box 5, Travel-Works Progress Administration, Entry 422: Folder: Works Progress Administration.

<sup>763</sup> Agenda for the Meeting of the Executive Committee of the Attorney General’s Survey of Release Procedures, AGSRP GC 1935–1938, Box 1, Entry 422: Executive Committee.

down and reduce salaries, the Survey architects insisted on finishing a “first-rate” study.<sup>764</sup> Throughout 1938 the Committee oversaw revisions to the five-volume publication.<sup>765</sup> Morse wondered if the statistics gathered for purposes of prediction were fruitful for “quantitative analysis.”<sup>766</sup> Howard Gill, working on the last volume on America’s prisons, asked for two extensions in 1938.<sup>767</sup> Through spring and summer, Morse and James Bennett worried about the prison volume’s progress.<sup>768</sup>

As the WPA Survey moved toward publication, the ironies of carceral liberalism found resolution in a curious synthesis. Aiming to bring national attention to the success of local governance, federal officials confronted the distrust of local officials. Hoping to bring relief workers into the study of release, the New Dealers found themselves flustered by labor disputes. Setting out to affirm the marriage of criminological discipline to the humanity of the social state, the Justice Department continually fell behind schedule and found itself obstructed by cold bureaucratic stubbornness. And yet the Survey of Release Procedures had succeeded in weaving together the activities of the New Deal’s welfare state and carceral state, and making the national government a leader of the states not only through force but through consultation. Its clumsy progress thus marked a groundbreaking achievement for the war on crime coalition.

### Discipline without Brutality

While many workers employed by the Works Progress Administration surveyed the procedures of release, many others were busily constructing cages. In its eight years of operation, the WPA contributed labor and funding to the building and renovation of 760 penal institutions—a small percentage of the 40,000 buildings constructed and 85,000 improved by the agency, but a considerable impact in terms the carceral state.<sup>769</sup> Some of the work happened at the federal level. From 1935 to 1937 WPA workers built the National Training School for Boys and the road that led there.<sup>770</sup> In June 1939 the agency employed 222 workers on Bureau of Prisons projects.<sup>771</sup> Through June 1943, \$51,974 was spent through the WPA on the Bureau of Prisons.<sup>772</sup> Other New Deal agencies sometimes participated with the WPA or on their own. The

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<sup>764</sup> Memorandum for Members of the Executive Committee, 9 July 1937, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>765</sup> Morse, Memorandum to the Members of the Executive Committee, 26 February 1938, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>766</sup> Morse To Bennett, 23 March 1938, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>767</sup> Howard B. Gill to Dean Wayne L Morse, 5 February 1938, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee

<sup>768</sup> Morse, Memorandum for Director James Bennett, 15 April 1938, AGSRP GC 1935–1938, Box 7, Entry 422: Peterson-Executive Committee: Executive Committee.

<sup>769</sup> U.S. Government Printing Office, Final Report on the WPA Program, 1935–1943 (1947), 52. In terms of the carceral impact, as a rough point of reference, one study found a total of 3,469 American jails in 1923. This does not include prisons, but still gives a ballpark idea of the WPA’s impact. Another study estimated the total number of jails in 1970 to be 2,317 jails, while yet another reported 4,037 in the same year. See *Historical Corrections Statistics in the United States*, 92.

<sup>770</sup> “National Training School for Boys (Former) – Washington DC,” LND; “National Training School for Boys (Former): Tertiary Road – Washington DC,” LND.

<sup>771</sup> U.S. Government Printing Office, Final Report on the WPA Program, 1935–1943 (1947), 34.

<sup>772</sup> U.S. Government Printing Office, Final Report on the WPA Program, 1935–1943 (1947), 118.



Civilian Conservation Corps helped build a juvenile correctional camp.<sup>773</sup> The Federal Emergency Relief Administration worked with the WPA to build reformatory improvements in Framingham, MA.<sup>774</sup> The Federal Art Project helped the WPA in renovating the grounds for the Whittier State School for Boys in Whittier California.<sup>775</sup>

Most of the WPA's carceral construction unfolded in cooperation with local authorities. WPA labor built a jail for Somervell County in Glen Rose, Texas, in 1934, and helped improve a jail in Rutland, Vermont, in the mid-1930s. In 1935 the WPA helped improve Rikers Island and a civil prison in Brooklyn, New York, constructed a second addition to the Baco County Courthouse Annex in Springfield, Colorado, and undertook major renovations of the Contra Costa County jail in Martinez, California. In 1936 the WPA assisted in renovating a detention facility in the Municipal Building in Pennsauken, New Jersey, provided \$5,802 to construct a jail in Kingfisher County, Oklahoma, and helped fund a jail in Santa Cruz, California. The WPA erected a new jail in Carbon Hill, Alabama, around 1937, and helped complete a new building for the Lincoln County jail in Canton, South Dakota, in 1938. In the late 1930s the WPA constructed the Trinity County Jail in Groveton, Texas, built the Peoria Jail in Arizona, and gave a makeover to the Eddy County Courthouse and Jail in Carlsbad, New Mexico, transforming its Victorian decor into an early Spanish aesthetic. In 1940 the Jefferson County Jail in Monticello, Florida, received WPA support, and as World War II raged the agency helped construct a Maries County courthouse and jail in Vienna, Missouri. From the towns of Elliott City, Maryland, Morehead and Pineville, Kentucky, and Jasper, Alabama, to Montrose, Colorado, San Francisco, California—and all the way in Lahaina, Hawaii, where they helped improve the Hale Pa'ahao Prison—the WPA revamped the detention state from sea to shining sea.<sup>776</sup>

In materialist terms, the most significant New Deal agency other than the WPA was the Public Works Administration, a creature of the National Recovery Administration, which undertook major penal construction at both the national and local levels. In 1939 the PWA took pride in its contributions for advancing modern criminological ideas. The “Federal prisons” had “failed to live up to the standards set by the Government's own penologists.” A PWA publication boasted its funding for “for 75 Federal prison projects costing \$14,914,000, including new correctional institutions for short-term Federal prisoners in Colorado, Connecticut, Kentucky, Texas, and Indiana.”<sup>777</sup> The PWA's assistance to the Federal Bureau of Prisons amounted to

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<sup>773</sup> “Los Prietos CCC Camp (former) – Santa Barbara CA, LND.

<sup>774</sup> “Reformatory Improvements – Framingham MA,” LND.

<sup>775</sup> “Whittier State School/Fred C. Nelles School for Boys – Whittier CA, LND.

<sup>776</sup> “Old Somervell County Jail – Glen Rose TX,” “Rikers Island Penitentiary Improvements—East Elmurst NY,” “Civil Prison (demolished) Improvements—Brooklyn NY,” “Baja County Courthouse Annex—Springfield CO,” “Contra Costa County Jail Improvements—Martinez CA,” Camden County Detention Home (Former) Renovation—Pennsauken NJ,” Kingfisher County Jail—Kingfisher OK,” “Santa Cruz City Jail (former)—Santa Cruz CA,” “Jailhouse—Carbon Hill AL,” “Lincoln County Jail and Sheriff's Residence—Canton SD,” “Trinity County Jail—Groveton TX,” “Peoria Jail Museum—Peoria AZ,” “Eddy County Courthouse and Jail—Carlsbad NM,” Jefferson County Jail (former) Improvements—Monticello FL,” Maries County Courthouse—Vienna MO,” Ellicott City Jail (former) Reparis—Ellicott City MD,” “Rowan County Jail and Superintendent's Office—Morehead KY,” “City Hall—Pineville KY,” “Jasper County Jail (former)—Jasper TX,” “Montrose County Jail (former)—Jasper TX,” Montrose County Jail—Montrose CO,” “San Francisco Hall of Justice and County Jail (demolished)—San Francisco CA,” “Hale Pa'ahao Prison Improvements—Lahaina HI”—all in LND.

<sup>777</sup> Division of Information, US Government Printing Office, *America Builds: The Record of PWA* (1939), 106, 199–200.

\$14,603,479, more than its assistance to the Post Office or to the Departments of Agriculture, Commerce, or Interior.<sup>778</sup>

The PWA did not neglect localities: the agency financed “126 non-Federal prisons and jails costing \$24,478,700 (excluding those in police headquarters and courthouses)” and promoted its “tailor-made” approach to meeting the “needs of the community,” for jails no less than schools and bridges.<sup>779</sup> Upon learning of the plight of Ozark County, Missouri, whose town of Gainesville a newspaper cartoon had made nationally famous for lacking a “courthouse” as well as a “church or a railroad,” the PWA approved \$16,380 to build a courthouse complete with a new jail.<sup>780</sup> The PWA worked elsewhere to replace “disgraceful” jails along with “cramped” police headquarters. Poor Barton County, Missouri, petitioned for help in an application complaining of the “wet and moldy” cells, the “rats, and mice” in its Reconstruction-era jail that “had to be killed with a target rifle.” The PWA graced Barton County with a “modern \$36,363 structure,” and also helped erect new prisons and penitentiaries, and proudly improved the famous prisons at Sing-Sing, Auburn, Joilet, and Atlanta.<sup>781</sup> Among the Public Works Administration renovation projects was a \$1,100,000 improvement undertaking for Alcatraz authorized in 1938 and commenced in 1940.<sup>782</sup>

It might appear an enduring irony that the national attempt at vindicating reform coincided with the above expansion of punishment—aided in many cases by precisely the same federal bureaucracy. But this duality was constitutive of carceral liberalism, which served the construction of the federal war on crime, including in its reliance on the states. Along with this respect for subsidiarity, carceral liberalism balanced reformist presumption with humility. In the late 1930s, the New Dealers came to embrace the dualities within carceral liberalism, its emphasis of discipline and rejection of brutality, in ways that increasingly highlighted the constitutive tension. Whether by defending repression in terms of its opposite or leveraging the power of the liberal state as a critique of itself, Sanford Bates, Homer Cummings, and Howard Gill each articulated different understandings of New Deal penology that emphasized the centrality of both imprisonment and discipline.

If by the late 1930s the New Deal welfare state gave mixed messages on incarceration, Sanford Bates did not shy from the attempt to reconcile the tensions. Bates’s *Prisons and Beyond*, released in 1937, captured the multifaceted, seemingly paradoxical values of carceral liberalism. He championed scientific understanding of each individual prisoner, the abolition of county jails, restorative justice, and a “more or less permanent” isolation of “incorrigible criminals” from society. He wanted effective parole and probation—a humane regime of “constructive discipline” that avoided “brutality on the one hand and sentimentality on the other.”<sup>783</sup> Prisons had “three purposes: to protect, to deter, and to improve.” He called prisons a success at the second and third tasks but a failure in protecting society. He also claimed to disbelieve he “the deterrent effect,”<sup>784</sup> an inconsistency perhaps owing itself to Bates’s paradoxical views. His book

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<sup>778</sup> *America Builds: The Record of PWA*, 100.

<sup>779</sup> *America Builds: The Record of PWA*, 199–200, 73.

<sup>780</sup> *America Builds: The Record of PWA*, 197.

<sup>781</sup> *America Builds: The Record of PWA*, 100.

<sup>782</sup> “Alcatraz Prison Improvements and Guard Housing,” LND.

<sup>783</sup> Bates, *Prisons and Beyond*, 303.

<sup>784</sup> Bates, *Prisons and Beyond*, 76, 196.

aimed to ask “fundamental questions” and took an approach unique to his moment, optimistic about the future while breaking with the wisdom of the progressive reformers of the past.<sup>785</sup>

Bates’s tract was not an exercise in reactive pragmatism or expediency. While his past experiences taught him the humanity of prisoners, his vision for discipline was transcendent. Bates looked to the prison as a social constant, a fixture of the future, its core functions eclipsing historical particularity. Bates anticipated a shining destiny for technocratic discipline. Technical progress had already fixed the problems with the draconian punishments of antiquity. “Since the failure of the British colonial penal ventures we have discovered much about sanitation, hygiene, and protective medicine,” Bates argued. “The telegraph and the radio make even the far corners of the earth less remote. There is no inherent reason why a prison colony should be a place where cruelty abides.”<sup>786</sup> Along with pining for modern penal colonies, Bates enthusiastically pondered the “prison of the future!” as one freed of the need for “silent, lonely” guards carrying firearms “at great expense to the taxpayers,” for the “institutions” might be “protected entirely by science.”<sup>787</sup>

In addition to championing the technological liberation of prisons from their traditional brutalities, Bates saw prison labor as a question distinct from the materialist constraints of political economy. Bates’s focus on the disciplinary dimension of labor was not unique in the New Deal. PIRA opposed competition with labor on the open market, but it was just as concerned with the rehabilitative power of labor, and the danger of “idleness.” But Bates went further in stressing prison labor for its own sake. He preferred state-use to private profit, but his elevation of “[p]ublic-work projects, labor camps, and opportunities for individual or group service” emphasized discipline shorn of economic considerations. Bates dismissed the fixation on protecting free labor from competition, arguing that taken to the extreme “it would be to the interest of labor to have as many people as possible in prison and keep them there as long as possible, in order to increase the number of jobs for those who manage to stay outside.”<sup>788</sup> Instead of looking to the immediate needs of workers it was important to contemplate the ideal model of labor—one in which every person, and every prisoner, had access to meaningful work.

While Bates emphasized the humanity of discipline, he eschewed the very notion of leniency. He wanted justice for private offenses to rely more on restitution, in part because uncompensated victims meant lax justice.<sup>789</sup> He defended inmate psychiatry and took pains to distance it from a reputation of leniency. While some saw the reliance on a warden’s prerogative as an invitation to personal despotism, Bates had a much more optimistic spin. The deputy warden was usually an “absolute monarch,” whose “duty to pass upon the reported infractions of the rules by inmates, to decide as justly as he can as to guilt or innocence and to mete out punishment. He must be neither too soft nor too harsh.”<sup>790</sup> Bates appears to have seen this balancing act as challenging but possible.

Even Bates’s defense of parole highlighted the desirability of the correctional state at its most punitive. Bates vindicated parole not for lessening reliance on punishment, but for augmenting and indeed ensuring it. He applauded parole violations for having loose standards of due process,

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<sup>785</sup> Bates, *Prison and Beyond*, 87.

<sup>786</sup> Bates, *Prison and Beyond*, 278.

<sup>787</sup> Bates, *Prisons and Beyond*, 118.

<sup>788</sup> Bates, *Prisons and Beyond*, 215, 293, 94.

<sup>789</sup> Bates, *Prisons and Beyond*, 292–3.

<sup>790</sup> Bates, *Prisons and Beyond*, 125, 177

since whereas a trial might acquit a man, a parole official could imprison him again. Parole in fact allowed “a higher degree of protection to the public.” He credited parole for lengthening prison sentences: “the average time served preliminary to parole was longer than the average time served on the definite sentence.”<sup>791</sup> Rising incarceration rates revealed the success, not the failure, of parole.

Bates’s vision was not reactive, but visionary. He did not lament the explosion of incarceration; he celebrated it. Bates imagined a carceral utopia—a system of discipline and redemption in reciprocal reinforcement, freed from its premodern and economically grounded past—and America was already on its way.

While Bates emphasized justice as the rationale for rehabilitation, Cummings defended the most extreme discipline in terms of humanity—the absence of brutality. Perhaps nothing better signaled the convergence of their approaches better than Alcatraz. As the New Dealers surveyed release and aggrandized the nation’s panorama of prisons and jails, Cummings’s first pet project provoked reconsideration. Fears of escape, strikes, and riots continued to reveal the precarity of discipline. In the late 1930s Alcatraz officials sought a manufacturer to develop a portable gun-detecting machine to scan prison cells mattresses.<sup>792</sup> Alcatraz’s surroundings also raised questions. It unsustainably relied on the San Francisco fire department. In 1938 the Bureau of Prisons responded to a Safety Survey Report by undertaking safety, fire, boiler, sanitary, and elevator inspections.<sup>793</sup> The same year the Treasury Department’s Procurement Division estimated \$1.5 million for a renovation plan. James Bennett cited the “present conditions” as “hazardous and unsanitary” and explained to skeptics of the price tag “all materials and personnel must be transported from the mainland.” Rock excavation would cost between \$5 and \$6 per cubic yard. Bennett conceded that a new maximum-security prison equipped for 300 inmates in a less costly place might cost \$2.5 million or less, but this would presumably not satisfy those who cherished a prison surrounded by water.<sup>794</sup>

In addition to official deliberations over facility upgrades came a new phase of public controversy. In the summer of 1937 Cummings worried a forthcoming film purporting “to present an authentic description” of Alcatraz would in fact “give a false impression of our whole penal program.”<sup>795</sup> Cummings was also “very deeply concerned” that a prisoner transfer might provoke a backlash.<sup>796</sup> A 1938 article by Antony Turanto, “America’s Torture Chamber,” contributed to the anxiety.<sup>797</sup> Cummings was urged to write a corrective to the bad press,

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<sup>791</sup> Bates, *Prisons and Beyond*, 249, 260

<sup>792</sup> J. E. Overlade to Warden, 5 December 1939, AAF Box 4.

<sup>793</sup> J.J. Johnston to Director, Bureau of Prisons, 7 November 1938, AAF Box 7.

<sup>794</sup> Bennet, Memorandum for the Attorney General, 4 April 1938, PHSC Box 70: Alcatraz Misc.

<sup>795</sup> To Honorable James A. Johnston, 1 April 1939, PHSC Box 70: Alcatraz Misc.

<sup>796</sup> Cummings, “Alcatraz By the Men Who Made It,” PHSC Box 70: Alcatraz Misc.

<sup>797</sup> Ward and Kassalbaum identify “contradictory views on Alcatraz. On the one hand, newspapers published rumor-based, sensationalized stories about incidents on the island that tended to cast a negative light on prison policies and management. On the other hand, many newspaper editors supported the federal government’s ‘get tough on crime’ policy, and Alcatraz as a central component and emblem of that policy. They expressed little surprise that a prison designed for the worst bad guys in the country had occasional disruptions, protests, assaults, and escape attempts.” Ward and Kassalbaum, *Alcatraz: The Gangster Years*, 149. But by the late 1930s Alcatraz “had become a major public relations problem for the Bureau of Prisons. All that the prison was supposed to represent—federal resolve to

perhaps either for the *Saturday Evening Post* or *Collier's*.<sup>798</sup> In collaborating on the piece with Criminal Division spokesman Gordon Dean, for which they split the writers' fee, Cummings carefully considered the public impact. They arranged to have favorable illustrations.<sup>799</sup> Cummings especially worried about which photos of himself *Colliers* would print, as the photos they had were "very likely to be terrible."<sup>800</sup>

Arguments over Alcatraz exposed disagreements among the war on crime coalition. Before the *Colliers* piece published, Cummings's successor Frank Murphy took aim at the prison's organizing rationale. Cummings saw the core tenets of his war on crime legacy at stake. Abolishing Alcatraz, a "symbol of the triumph of law and order" would be a "tragedy."<sup>801</sup> Some in the press supported Cummings.<sup>802</sup> He also had a new ally in Sanford Bates, who changed his mind about Alcatraz.<sup>803</sup> In 1937 Bates argued that although it had the strictest "discipline" of any federal system, Warden Johnston ensured "that no brutality or inhumanity shall be practiced."<sup>804</sup> Once a skeptic, Bates now believed the institution "humanely and efficiently administered" and that there was no "cause for concern on the part of the public that the prisoners were justly treated." Most San Francisco locals did not mind the prison, despite "selfish and ill-timed" reports in the press.<sup>805</sup> Cummings prepared a letter to Murphy to explain Alcatraz's importance to the very "functioning of our Federal penal system," to ensure "mutual respect and good feelings," and to inform Murphy that he did not know his position when *Collier's* accepted the piece. He never sent the draft but instead communicated his views in person.<sup>806</sup>

Cummings's abiding defense, "Why Alcatraz is a Success," published in July 1939, turned on the dualities of carceral liberalism (see Figure 4.5). Alcatraz exemplified control and humanity. Prison Bureau head Sanford Bates, "career penologist of long experience," was "both a scholar and a realist." His successor, James V. Bennett, was also unimpeachable.<sup>807</sup>

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punish 'public enemies,' a means of getting the worst trouble-makers out of the other federal prisons, and setting a standard for state high-security prisons—became lost in the welter of denunciations directed at the Bureau for maintaining a penitentiary that seemed to contradict so many aspects of progressive penology" (185).

<sup>798</sup> Dean, Memorandum for the Attorney General, 9 April 1938, PHSC Box 70: Alcatraz Misc; Cooper to Cummings, 31 March 1938, PHSC Box 70: Alcatraz Misc.

<sup>799</sup> Cummings to Dean, 19 May 1939, PHSC Box 70: Alcatraz Misc; Cummings to Charles Colebaugh, 26 May 1939; Colebaugh to Cummings, 7 June 1939; Colebaugh to Cummings, 7 June 1939—all in PHSC Box 70: Alcatraz Misc.

<sup>800</sup> Cummings to Dean, 26 May 1939, PHSC Box 70: Alcatraz Misc.

<sup>801</sup> Cummings to Henry Stydan, 14 June 1939, PHSC Box 70: Alcatraz Misc.

<sup>802</sup> Cummings to George S. Silzer, 14 June 1939, PHSC Box 70: Alcatraz Misc.

<sup>803</sup> Bates, *Prisons and Beyond*, 142.

<sup>804</sup> Bates, *Prisons and Beyond*, 145.

<sup>805</sup> Bates to Cummings, 16 June 1939, PHSC Box 70: Alcatraz Misc.

<sup>806</sup> Cummings to Murphy, 24 June 1939, PHSC Box 70: Alcatraz Misc..

<sup>807</sup> Cummings, "Why Alcatraz Is a Success," *Colliers*, 29 July 1939.

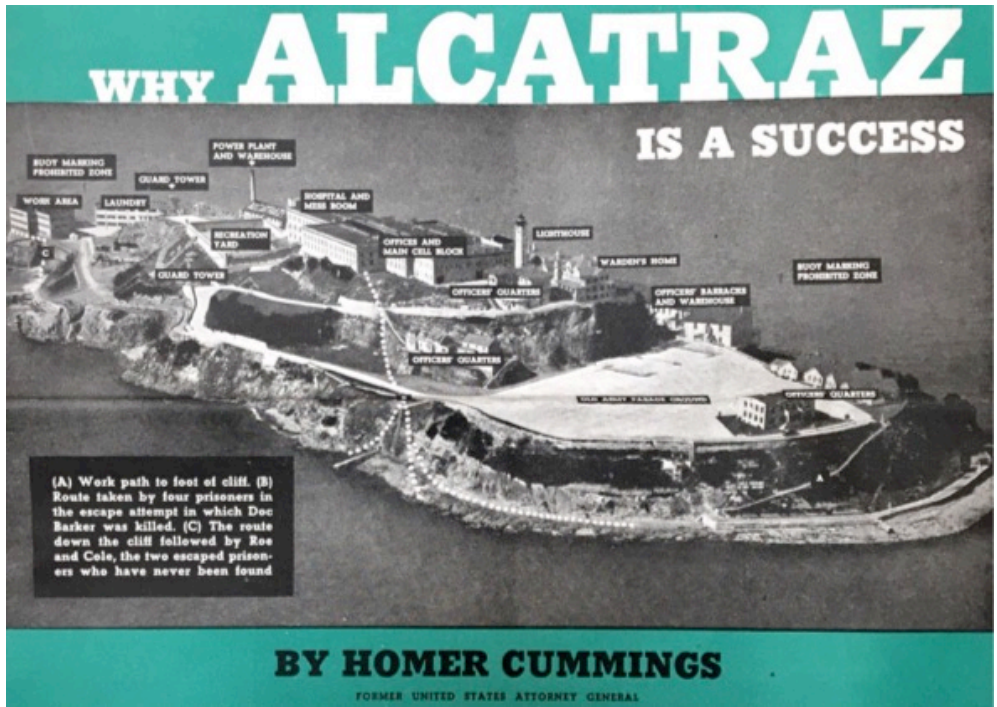


Figure 4.5: Cummings’s defense of Alcatraz.  
Source: “Why Alcatraz Is a Success,” *Colliers*, 29 July 1939.

Cummings hailed Alcatraz for its discipline and isolation. In the event of a riot, “jet-like arrangements installed in the ceiling of the dining hall” would spray tear gas. Buoys protected the 300-yard perimeter, and heavily armed guard towers and flood lights secured against escape. As a last line of defense, the “[s]wift cold tides. . . along the island shores” meant “only an expert swimmer in good training can negotiate the one and one-half miles to San Francisco.” These precautions were necessary for Alcatraz, and Alcatraz was necessary for the ““escape artists”” and ““end products”” of our law enforcement. And it was working. High profile escapees like Joe Bowers were killed or stopped. The publicized attack on Warden Johnson was an aberration. A hunger strike in February 1936 was easily squashed through the force feeding of recalcitrant prisoners. Cummings defended the unrelenting prison rules: “Every violation of rules, every omission, every attempt to cause confusion or disturbance or break down routine is noted and guards are required to report.”<sup>808</sup>

But Cummings also disputed the press’s depictions of inhumanity. Journalists had unfairly blamed Al Capone’s mental disturbances on the prison. The nearly twenty ““inside’ stories written by former inmates of Alcatraz” were ““juiced up’ by fictitious items and loaded with major and minor misstatements of fact.” In reality, prisoners enjoyed designated time to “talk freely” and smoke cigarettes. They could choose between “light” or “heavy” portions of the “good and wholesome” mess hall offerings, although they had to finish their plates unless sick. And although Alcatraz housed the three hundred worst federal prisoners out of seventeen thousand—despite its organizing principle of unflinching detention of the least redeemable—

<sup>808</sup> Cummings, “Why Alcatraz Is a Success,” *Colliers*, 29 July 1939.

“even some of those in Alcatraz may sometime reform,” Cummings conceded. He and Bates had discussed the prospect in October 1935 and indeed transferred some inmates from Alcatraz to other prisons. Even in its purest expression, New Deal carceral discipline accommodated redemption.<sup>809</sup>

In response to his piece, Cummings received reassurance that Alcatraz would survive its public relations problems and would serve “an essential public need through the years.”<sup>810</sup> One letter hailed Alcatraz’s “stringent discipline without brutality,” which secured “humane treatment for the other nine tenths of society.” For the sake of “honest men crushed. . . by inexorable circumstances,” America should “stiffen her back against the brigand and racketeer in high places as well as low” and “let hardened criminals have the hard rock.”<sup>811</sup> Joseph Forsyth insisted Alcatraz’s detractors mostly comprised the “politicians of San Francisco” with aesthetic objections.<sup>812</sup> Bates applauded the diplomatic tone of Cummings’s article, which he guessed was “a little more dignified than you would have liked it to be.”<sup>813</sup>

Cummings turned to the political leadership to optimize impact. He sent the article to Congressmen Wright Patman and Senator Henry F. Ashurst, suggesting they might read it into the Congressional Record, which Congressman Patman ultimately did.<sup>814</sup> Cummings sent his article to the president by way of Stephen Early, and FDR responded with encouragement but seeming neutrality on the controversy between his Attorneys General. “Surely no one is in a better position to explain the purpose of this institution than the one who conceived the idea and you have done this in a very interesting and readable article. I am glad you brought it to my attention,” FDR wrote.<sup>815</sup>

Murphy and Cummings disagreed on Alcatraz, and Roosevelt attempted to stay neutral, but they all spoke a common language on questions of crime and punishment and penology. The Justice Department itself seemed divided, as Murphy’s subordinate, J. Edgar Hoover, advised the Prison Director of which Alcatraz inmates were filing habeas corpus writs.<sup>816</sup> But Cummings and Bates could come together behind Alcatraz as a staple of carceral liberalism. The war on crime coalition differed on details, but the island prison was secure in the New Deal state. It would stay open until 1963.

Whereas Bates defended parole for fueling incarceration, and Cummings defended Alcatraz for its humane treatment, Howard Gill issued a scathing indictment of America’s growing prison system. Gill, once a superintendent at Norfolk Prison Colony in Massachusetts, maintained an idealism in his progressive penology through the New Deal, as shown in Volume V of the *Survey of Release Procedures*, published in 1940. The other four volumes sought to vindicate reform, but Volume V looked with a sense of resignation on the enormity of incarceration, including its reliance on discipline. Gill’s volume seemingly stood apart from New Deal penology, as it barely

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<sup>809</sup> Cummings, “Why Alcatraz Is a Success,” *Colliers*, 29 July 1939.

<sup>810</sup> To Johnston, 26 June 1939, Cummings 70: Alcatraz Misc.

<sup>811</sup> Bensinger to Cummings, 20 July 1939, PHSC Box 70: Alcatraz Misc.

<sup>812</sup> Forsyth to Cummings, 18 August 1939, PHSC Box 70: Alcatraz Misc.

<sup>813</sup> Sanford Bates to Cummings, 24 July 1939, PHSC Box 70: Alcatraz Misc.

<sup>814</sup> To Honorable Wright Patman, 24 July 1939; Cummings to Henry F. Ashurst, 31 July 1939; Cummings to Wright Patman, 7 August 1939—all in PHSC Box 70: Alcatraz Misc.

<sup>815</sup> Cummings to Stephen Early, 24 July 1939, PHSC Box 70: Alcatraz Misc.; Franklin D. Roosevelt to Cummings, 27 July 1939, PHSC Box 70: Alcatraz Misc.

<sup>816</sup> J. Edgar Hoover, Memorandum for the Director of Prisons, 28 March 1939, AAF Box 10.

defended either the carceral state's detentions or its rehabilitation. But in a way, Gill served as the conscience within carceral liberalism, even building on the progressive penologists' critique of mistreatment while ultimately conceding the reality of prison expansion. Within the collaborative federalism of the war on crime, the national effort to bring multiple jurisdictions under scrutiny functioned as the corollary to the national invocation of the states to vindicate reform. The capacity of government to critique itself, to leverage power and resources as a check on its own operations, helped maintain the liberality of the New Deal war on crime. Proud of its mechanisms of discipline and denying any love for brutality, carceral liberalism could also claim credit for acknowledging the liberal state's shortcomings.

Gill's Volume V lamented America's increasing reliance on prisons. Five new federal prison camps and eleven federal jails opened only in recent years but much more construction occurred at the state level.<sup>817</sup> Gill disliked this trend. Although the "public were led to believe that only with high walls, steel bars, and cage-like cells were criminals kept from breaking forth to murder, rob and rape law-abiding citizens," prison construction "created a vicious circle." The prison system fueled "as much desperation and degradation as it has sought to restrain." Incarceration had become blunt and indiscriminate, sometimes allowing "the most dangerous criminals" more "freedom" than lesser offenders. Prison design harmed prisoners and poisoned their will. Subjecting virtually all prisoners to "interior cell blocks, originally designed as punishment cells" was in fact "unnecessary, expensive, and detrimental to health and morale."<sup>818</sup> Prisons had become too centralized and too concerned with false threats. While at first central administration made sense, large modern penitentiaries now had "long and awkward corridors which impede rather than facilitate contact" and proved inflexible toward "changing conditions."<sup>819</sup>

Despite regional differences, Gill identified a fundamentally national problem. Gill's examination of 30,000 prisoners in 35 states found "little or nothing" suggesting that the 350 prison camps were "anything more than convenient concentration stockades."<sup>820</sup> Southern prisons were "purely custodial" and cheap to operate, compelling labor through "[t]he lash, chains, and stripes." But the report chided Northerners who found themselves "horrified at conditions in some southern road and farm camps," to consider that "perhaps citizens of the South would be equally horrified at the killing atmosphere of a steel cell-block." What united North and South, the Survey found, was the lack of "anything resembling professional preparation for release in relation to . . . criminal behavior."<sup>821</sup>

Strikingly, Volume V criticized the dominant ethos of internal extreme prison discipline—which both Bates and Cummings defended in the context of Alcatraz. "Next to keeping his men, the prison administrator's chief duty in the prison is traditionally the maintenance of discipline," Gill noted. And yet "subjection so inspired is only skin-deep while underneath there smolder the fires of revolt, kept hot by the demands of those in authority."<sup>822</sup> Prison order relied on a panoply of "rules and regulations, not only for inmates but for guards and officers alike." There were

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<sup>817</sup> *Survey of Release Procedures*, Vol. V, 311.

<sup>818</sup> *Survey of Release Procedures*, Vol. V, 86, 87, 298.

<sup>819</sup> *Survey of Release Procedures*, Vol. V, 94.

<sup>820</sup> *Survey of Release Procedures*, Vol. V, 48.

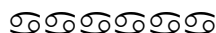
<sup>821</sup> *Survey of Release Procedures*, Vol. V, 47.

<sup>822</sup> *Survey of Release Procedures*, Vol. V, 109.



rules enforcing good manners and banning anti-patriotic behavior.<sup>823</sup> These regulations could effectively create a relationship between officer and prisoner resembling that between higher castes and “untouchables” in India. Unwritten rules in particular were potentially tyrannical.<sup>824</sup> Volume V agreed with other carceral liberals on labor as a remedy for idleness, and lamented that “50 percent or more” prisoners in 24 states were idle. But while many in the criminological community feared idleness caused riots, Gill found it mostly accounted for “mischief and petty fights and irritations.”<sup>825</sup>

Volume V underscored the alacrity with which the New Dealers simultaneously championed and critiqued the instruments of repression. The characteristic ability and willingness to scrutinize their own institutions helped provide a liberal cover to the carceral liberals, even if it left the growth of incarceration untouched. Despite its trenchant criticisms, Gill’s outlook was ultimately fatalistic. The need to shield “society from the depredations of the abnormal, sub-normal, or vicious criminal” made prisons necessary, however evil. This short-term pragmatism accompanied a long-term pessimism, as a search through America’s history of incarceration “as a means of rehabilitation, moral, physical, intellectual or industrial, does not incline one to an optimistic conclusion.”<sup>826</sup> Rather than defending New Deal penology for its technologically utopian potential, as Bates did, or upholding discipline as unmistakably humane, as Cummings did, Volume V revealed a cold reality—carceral liberalism might aspire to discipline without brutality, but in practice they can be hard to separate.



With the dominance of the profitable industrial prison fading into the past, the New Deal reformers inaugurated a new penological program capable of reconciling different correctional priorities, managing short-term as well as long-term challenges to political order, and thus helping to legitimate national enforcement authority. Roosevelt and Bates had to translate the northeastern penological traditions in which they were well versed to confront the structural and ideological threats posed to federal legitimacy. Structurally, this meant recognizing federalism—encouraging both incarceration and release at the state level, and showing a humble willingness to learn from it. Ideologically it meant the construction of a new program, carceral liberalism, an ecumenical temperament that sought to reconcile different penological approaches, and embracing both the doctrine of discipline and the promise of redemption. The New Dealers were not neutral or agnostic on imprisonment—they were ambivalent, meaning they had strong tendencies toward both strengthening and lessening America’s reliance on prisons. This ambivalence brought together the unforgiving isolation of Alcatraz, the Survey of Release Procedure’s intellectual ambitions of defending parole, the New Deal’s material expansion of carceral systems, and the diversity of ideas in such carceral liberals as Roosevelt, Cummings, Bates, Miller, and Gill. The ambivalence of carceral liberalism, along with its respect for American federalism, fueled the surge of all systems of correctional supervision at all levels of government through the 1930s and ultimately laid the foundations for America’s modern carceral capacity.

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<sup>823</sup> *Survey of Release Procedures*, Vol. V, 71, 117.

<sup>824</sup> *Survey of Release Procedures*, Vol. V, 72, 113.

<sup>825</sup> *Survey of Release Procedures*, Vol. V, 53, 102.

<sup>826</sup> *Survey of Release Procedures*, Vol. V, 35.

Purifying the carceral system of profit made discipline itself, including its promises of rehabilitation, a public good. Freed of the nineteenth-century pressures of austerity, the modern prison system would no longer provoke classical liberal anxieties for its burgeoning growth. Even parole could be defended on the basis that it increased prison sentencing. Whereas economic interest had shaped penological systems in the past, prison labor would now serve the public order, inside and outside the prison, and produce goods for use by the state. In 1938 prisoners made many items for government use—cotton duck, canvas, shoes, brushes, clothing, metal transfer cases, metal specialties, brooms, castings, wooden furniture, and rubber deck. Others did work in laundry services, reforestation, road construction, building construction, farming, dairy, canning, printing, and mattress and pillow making.<sup>827</sup> As the domestic state expanded, so too did its needs, which a growing prison population could conveniently provide. Just as important, whereas economic considerations had previously tethered prison labor to capitalist interests while limiting the emphasis on discipline for its own sake, New Deal liberalism finally normalized the Foucauldian model of punishment in the United States.

The ballooning domestic state would help integrate corrections into the welfare system. The Survey of Release Procedures had pondered the transition made by inmates and whether an “intermediate” institution between “the state training school and the state penitentiary” could serve socialization.<sup>828</sup> In the 1930s prisons became places where inmates could learn the values of New Deal liberalism. In New York’s Walkill State Prison, criminological classes invited prisoners to ask holistic questions about political economy, like “Why do we have depression?” and what was “the place of government in solving social and economic problems?”<sup>829</sup> Future public education could expediently become conduits to the carceral state.

The New Deal penal state pointed to an ominous racial trajectory. On the one hand, federal authorities often had paternalistic intentions, as the WPA considered prison educational activities “for the benefit of Negroes.”<sup>830</sup> On the other hand, the federal incarcerated population became quantitatively less white throughout the 1930s. While demographics hardly shifted on gender—95% of federal prisoners were men throughout the decade—the racial change was hardly subtle. The percentage of federal prisoners classified as white fell from 75% in 1932 to 69% in 1940 and 66% in 1946 (see Figure 4.6).<sup>831</sup> In state institutions, which grew disproportionately in the South, white prisoners in 1937 served an average of 16.4 months compared to 19.5 months served by non-whites. Although for auto thefts whites served more time and for robbery sentences were identical, nonwhites served considerably longer sentences for murder, manslaughter, forgery, and rape.<sup>832</sup> In the long term, the emphasis on rehabilitation, on welfare, and on state use for prison labor, hardly constrained the carceral state’s social disparities any more than its social control.

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<sup>827</sup> *Survey of Release Procedures*, Vol. V, 362.

<sup>828</sup> Lovell Bixby to Miller, 12 March 1936, AGSRP GC Box 1, Entry 422: Memorandum.

<sup>829</sup> *Survey of Release Procedures*, Vol. V, 68.

<sup>830</sup> U.S. Government Printing Office, *Final Report on the WPA Program, 1935–1943* (1947), 61.

<sup>831</sup> *Historical Corrections Statistics in the United States*, Table 3-32, 66.

<sup>832</sup> *Historical Corrections Statistics in the United States*, Table 3.8, 61.

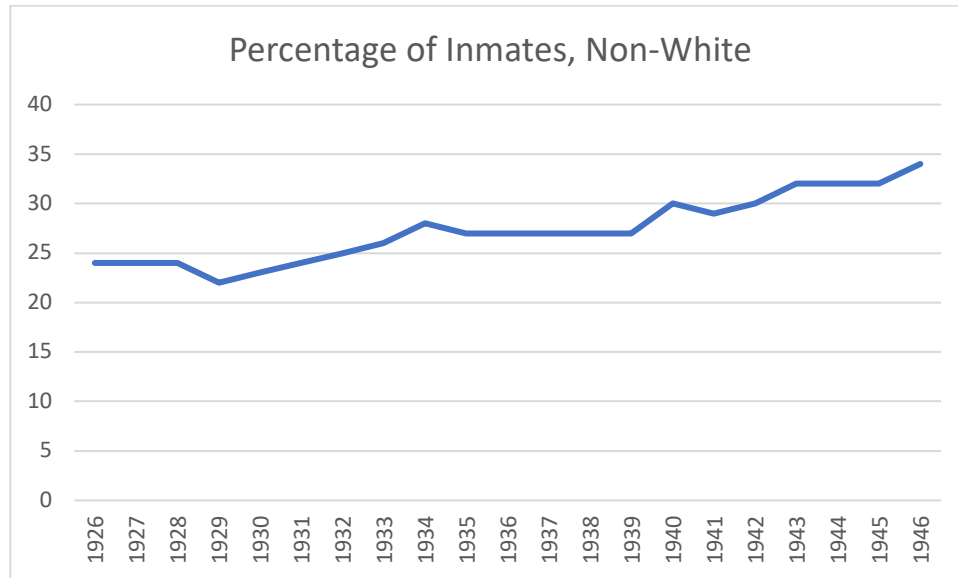


Figure 4.6 Racial disparity in federal prisons, 1926–1946.

Source: Graph created from data in *Historical Corrections Statistics in the United States*, Table 3-32, 66.

New Deal penology did not fail to limit incarceration despite itself, but rather oversaw punishment and rehabilitation rising in mutual symbiosis. While stabilizing the instruments of repression and confronting short- and long-term crises of legitimacy, Roosevelt and Cummings led a new liberal approach to penology no less than to criminology. Carceral liberalism reconciled rehabilitation and incarceration, penological reformism and carceral conservatism, American federalism and national activism.

Other areas of the New Deal war on crime complemented this carceral liberalism. Before the end of Roosevelt's administration, it would oversee a revolution in constitutional and legal practices that accommodated a refined security state, which could mobilize and survive the crisis of World War II. But on prisons, few factors shaped the future more than the creation of new classes of crime. One institution noticed but not scrutinized by the *Survey of Release Procedures* was the narcotic farm, a federal detention center that compelled addicted inmates to "submit to treatment. . . until discharged therefrom as cured."<sup>833</sup> Such facilities would give a therapeutic cast to the carceral state. If one upshot of carceral liberalism was the greatly expanded detention capacity, one of the most significant and enduring consequences of the New Deal war on crime would be the multi-jurisdictional crusade to make America safe from drugs.

<sup>833</sup> *Survey of Release Procedures*, Vol. I, 11.

## Chapter 5

### *Worse than Murder: Making the War on Drugs*

In July 1933, at a ceremony in Lexington, Kentucky, an inaugural cornerstone marked a new kind of national detention facility. Officials situated the first federal narcotics farm, an institution of both voluntary and coerced treatment, in the grand sweep of America's global leadership. The United States had taught the world "the danger" of drug abuse—by leading the prohibition of non-medical opium in the late-nineteenth century, spearheading conferences in Shanghai in 1905 and at the Hague in 1912, and shepherding anti-narcotics treaties to ratification in 1925 and 1931. The narcotics farm embodied this tradition of "control, management, and discipline" toward the "safekeeping of the individual and the protection of American communities."<sup>834</sup> There in Lexington, domestic security and international diplomacy, repression and rehabilitation, converged in the interwar campaign against drugs.

The New Deal vastly expanded the federal role in drug control. In addition to narcotics farms in Kentucky and Texas, the Roosevelt administration led global efforts at controlling trafficking and extended the domestic reach of the national drug police. These undertakings pushed the constitutional limits of federal power, citing treaty obligations for robust drug regulation to persuade state legislatures to ratify model drug legislation. The campaign crested when Congress passed the Marijuana Tax Act of 1937, outlawing cannabis throughout the United States. Unlike alcohol prohibition, this amplification of domestic police power did not occasion a Constitutional Amendment, but rather passed by voice vote before Roosevelt unceremoniously signed it. Within five years the administration that came to power vowing to end alcohol prohibition had started the modern war on drugs.<sup>835</sup>

Historical scholarship tells a war on drugs story mostly distinct from the New Deal.<sup>836</sup> Works focusing on Federal Bureau of Narcotics chief Harry Anslinger depict a crusading conservative holdover from the Herbert Hoover administration, an aberration alongside Roosevelt's progressive agenda. Such narratives typically point to reactionary xenophobia, the targeting of Hispanics, and a moral panic about marijuana abuse against whose "sweeping march" Anslinger somewhat suddenly decided to lead the nation in a sensationalized struggle.<sup>837</sup> Thus did "Anslinger's war on drugs" turn America into "Anslinger's nation," as Alexandra Chasin puts it.

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<sup>834</sup> The Board of Commerce of Lexington, KY, Laying of the Corner Stone of First U.S. Narcotic Farm Lexington, KY, 2 pm, 29 July 1933, OF431, Folder, Narcotics, 1933–1943; Assistant Surgeon General, Division of Mental Hygiene to Miss Sara Graham Mulhall, 27 July 1933.

<sup>835</sup> Lisa McGirr's *War on Alcohol* identifies the prohibitionist 1920s as a foundational decade of state building that helped pave the way to the New Deal. Although she says explicitly that "Roosevelt's New Deal war on crime grew out of the prohibition wars," she only discusses it for a couple pages and leaves it to future scholars to explore the many changes in the 1930s. Lisa McGirr, *The War on Alcohol: Prohibition and the Rise of the American State* (New York: W.W. Norton, 2015), 218.

<sup>836</sup> Kathleen Frydl emphasizes state power and discusses the 1930s international, regulatory, and tax origins. Frydl hardly mentions the New Deal, and marks 1940 as the beginning of the criminal regime and "a militant drug war [that] has served as a mechanism by which the federal government has reallocated functions, forged alliances, and channeled resources, and depicted, enhanced, and legitimized its sovereign power." Kathleen Frydl, *The Drug Wars in America, 1940–1973* (Cambridge: Cambridge University Press, 2013), 12.

<sup>837</sup> Musto, "Marijuana Tax Act"; Susan L. Speaker, "'The Struggle of Mankind against Its Deadliest Foe': Themes of Counter-Subversion in Anti-Narcotic Campaigns, 1920–1940," *Journal of Social History* 34, No. 3 (Spring, 2001), 591–610, 58.

Anslinger went on to mobilize “considerable, if conservative” support to back his agenda with at most the passive complicity of Roosevelt.<sup>838</sup> According to John C. Williams, the Republican bureaucrat’s job security was “precarious” in the New Deal, yet he managed repeatedly to save his job and his bureau’s independence through leveraging the support of conservatives and the “powerful pharmaceutical lobby.” Williams’s rich exposition dismisses Anslinger’s emphasis on treaty obligations to rationalize domestic drug control as opportunistic and does not situate marijuana prohibition as an international policy concern.<sup>839</sup> And while Matthew R. Pembleton’s sweeping account of Anslinger’s Narcotics Bureau in building the global drug war, it says little about the 1930s construction of national sovereignty around these international obligations in the 1930s and downplays the role of the New Deal state itself before World War II.<sup>840</sup>

Anslinger’s legacy is indelible, but his national marijuana ban invites broader questions about New Deal crime and punishment. As the head of one of the Treasury Department’s key enforcement agencies, Anslinger was a principal figure in Roosevelt’s war on crime coalition. He reconciled Harry Morgenthau’s operations with those of Attorney General Homer Cummings. Although a conservative Republican, Anslinger had important ideological affinities that acclimated him to the New Deal approach to crime. “Reminiscent of their position in the fight over the Harrison Act,” the 1914 law that banned heroin and regulated cocaine and opium, David Musto notes that “the most ‘liberal’ spokesmen were among the most eager to protect the public by prohibiting cannabis.”<sup>841</sup> While classism and racism carry explanatory power, these biases unfolded within New Deal drug policy even outside of Anslinger’s direct control. What is more, these bigotries cooperated with progressive values in driving federal drug prohibition.<sup>842</sup> Among the important liberal values was internationalism. International agreements not only strengthened national boundaries, serving xenophobic fears of drugs as alien contaminants, they rationalized uniformity of enforcement across national lines.<sup>843</sup> In particular, the 1931 Geneva Convention, time and again, became the crucial rationale for maintaining the independent narcotics bureau and passing state-level laws to conform with international standards.

New Deal liberalism and Anslinger’s crusade mutually served one another. Urging the states to ban marijuana in 1931, Anslinger conceded that the national government could not override

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<sup>838</sup> Alexandra Chasin, *Assassin of Youth: A Kaleidoscopic History of Harry J. Anslinger’s War on Drugs* (Chicago and London: University of Chicago Press, 2016), 4–5, 175.

<sup>839</sup> John C. McWilliams, *The Protectors: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930–1962* (Newark: University of Delaware Press, 1990), 30, 86.

<sup>840</sup> Pembleton devotes one paragraph to Roosevelt in the 1930s, focusing on his somewhat passive role in retaining Anslinger, and says little else about the president at peacetime. His treatment of World War II provides a richer explanation of the importance of Roosevelt’s international priorities to drug policy. Matthew R. Pembleton, *Containing Addition: The Federal Bureau of Narcotics and the Origins of America’s Global Drug War* (Amherst: University of Massachusetts Press, 2017), 66, 117–120

<sup>841</sup> David F. Musto, MD, *The American Disease: Origins of Narcotic Control* (New Haven and London: Yale University Press, 1973), 228.

<sup>842</sup> Some scholars have searched in vain for evidence of a populist concern about Hispanic users. John F. Galliher and Allynn Walker, “The Puzzle of the Social Origins of the Marijuana Tax Act of 1937,” *Social Problems* 24, No. 3 (Feb., 1977), 367–376.

<sup>843</sup> Complicating the picture a bit further, arguments that see marijuana criminalization as a distinctly U.S. phenomenon of quasi-colonialism must contend with new scholarship demonstrating populist fears of the drug among the poor in Mexico that fueled prohibitionist impulses in the nineteenth century. Isaac Campos, *Home Grown: Marijuana and the Origins of Mexico’s War on Drugs* (Chapel Hill: University of North Carolina Press, 2012).

their decisions.<sup>844</sup> Six years later, the activist liberalism of the New Deal empowered him nationally more than ever. The story of why Roosevelt retained Anslinger's Bureau suggests the greater ramifications of national drug prohibition as a co-authored composition. Despite their differences over liquor, in the volatile aftermath of repeal the bond between Anslinger and the New Dealers secured the Treasury Department's role in law enforcement, maintaining the war on crime through the mid 1930s and ultimately launching the modern war on drugs as a core commitment of the liberal state.

### For a Principle, Not a Job

The end of alcohol prohibition in 1933 introduced problems and opportunities for the Treasury Department's enforcement machinery. Full laissez-faire for liquor did not follow. Through taxes and regulation, the Treasury tried to minimize bootlegging. The legal liquor industry, in turn, sought to sway the new regime toward policies relaxed enough to discourage black markets. Under Henry Morgenthau, Treasury Decision 4429 imposed a tax on spirits, required at Customs houses, which some in industry protested as too high. Frederick Wildman, a spirits dealer, argued that the American consulates should issue the IR stamps in the place of origin to cut costs for legal importers and undercut bootleggers' arbitrage opportunities.<sup>845</sup> Thus did the new campaign on alcohol entail a newly regulated industry negotiating for influence.

Relegating alcohol control to the realm of corporate regulation, the New Deal administration looked elsewhere for more uncompromising fronts in the federal struggle against intoxication. Franklin Roosevelt himself strongly supported illicit drug control. As governor of New York, he backed the Uniform Narcotics Law championed by Richmond Hobson, the "Father of American Prohibition." Narcotics control united Hobson and other Democrats who embraced the Volstead Act and Roosevelt, who ran in 1932 on a promise to repeal prohibition.<sup>846</sup> Upon taking power, Roosevelt's administration confronted questions of restructuring, budgets, and personnel, which carried long term implications for the federal law-enforcement state. The administration soon expanded the Treasury's traditional law enforcement role through the creation of a coordinating agency directed against smuggling.<sup>847</sup> But Roosevelt's election also introduced new possibilities of fundamental reorganization. The Narcotics Bureau, formally constructed from an ad hoc enforcement arrangement in 1930, was a clear holdover from the Hoover administration. So was its commissioner, Harry Anslinger, a Republican married into the family of former Treasury Secretary Andrew Mellon, despised by Democrats for his ardent fiscal conservatism. The New Deal's centralizing logic of New Deal and partisan animus conspired against letting Anslinger maintain his independent narcotics fiefdom. Whether to retain him was almost as weighty a question as whether to retain J. Edgar Hoover.

Despite partisan and ideological differences, Anslinger and the New Deal Democrats had a shared vision for the future of drug policy. His affinities to New Deal narcotics regulation overcame partisanship and saved the Narcotics Bureau as an independent agency. Anslinger's

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<sup>844</sup> "Government Will Ask States to Ban Growing of Marijuana," *New York Times*, 16 September 1931.

<sup>845</sup> Wildman to Henry Morgenthau, 30 August 1934 OF 21 Box 20, Folder: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>846</sup> "Asks Uniform Laws to Curb Narcotics: Roosevelt Backs Effort," *New York Times*, 20 February 1931.

<sup>847</sup> Minutes of the Meeting for the Committee on the Coordination of Treasury Activities for the Prevention of Smuggling, 11 September 1934, ROLEC Box 1.

internationalism, his humanitarianism, and his holistic criminology fit even better with the model of Cummings's Justice Department than with the previous Republican government. These common strains of liberalism, rather than his anomalous conservatism, saved the Narcotics Bureau and kept the Treasury armed after Prohibition. Anslinger's comfortable place within the war on crime coalition and his agenda's compatibility with New Deal liberalism helped legitimate a new federal role for narcotics enforcement and built the modern war on drugs.

In the aftermath to prohibition, Anslinger and the New Dealers shared practical common ground. To be sure, while at the Bureau of Alcohol, Anslinger supported prison time even for consumption, a rather different outlook from Roosevelt's 1932 campaign promises.<sup>848</sup> But the end of Volstead enforcement clarified matters, as Anslinger's Narcotics Bureau operated in cordial cooperation with other such bureaucracies as Indian Affairs and customs consulates.<sup>849</sup> He also appreciated J. Edgar Hoover, congratulating him for his promotion to head the Division of Investigation, and Hoover reciprocated with a pledge to assist the Narcotics Bureau in "every possible way."<sup>850</sup> Anslinger shared the New Dealers' emphasis on engagement with the wider academic and business community. His crusade had a plausible humanitarian orientation, as seen in his other commitments to social reform. Perhaps most important, his internationalism became the credential that not only saved him his job and protected the Narcotic Bureau's institutional independence; it went on to shape the drug policy development through the decade.

Anslinger shared the liberals' affinity with public outreach. While the Justice Department's Justin Miller dispatched the broader society to promote interest in "crime prevention," narcotics officials likewise engaged in outreach as a public relations exercise. Sometimes members of the public adopted Anslinger's line on strategy; his journalist friend E.E. Eberle complained that some newspapers used the term "drugs" when talking about "narcotics."<sup>851</sup> Anslinger often received invitations to speak before civic organizations, including the Public Relations Forum, the American Association of University Women, the Penn Educational Club, the Geological Society, the Civic League, and the Lyons Club.<sup>852</sup> His adept civic associationism made him a fitting leader in the war on crime coalition.

Just as the New Deal Justice Department cultivated relationships to academia, seeking to build an intellectual community around its crime prevention strategies, so did Anslinger reach out to America's universities. His public outreach was not a rogue undertaking. Anslinger sought approval for his address to the Federation of State Medical Boards at Chicago.<sup>853</sup> Medical and pharmacological schools often undergirded this networking. Anslinger was invited to deliver talks to the Medical School of Maryland and to the Pharmacology Department at the University of Maryland, Baltimore.<sup>854</sup> His fellow officials gave talks at medical schools as well.<sup>855</sup> The

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<sup>848</sup> Musto, *The American Disease*, 211.

<sup>849</sup> D.E. Murphy to Anslinger, C.C. Commissioner of Indian Affairs; C.C. H.V. Williamson, Narcotic District Supervisor, 20 October 1932; Jaurez. Attn: Bureau of Narcotics, 22 November 1932, HAP Box 3, File 8.

<sup>850</sup> J. Edgar Hoover to Anslinger, 2 August 1933, HAP Box 3, File 7.

<sup>851</sup> E.F. Eberle to Anslinger, 8 January 1932, HAP Box 3, File 8.

<sup>852</sup> Anslinger to Gaston 30 January 1935 HAP Box 3, File 5.

<sup>853</sup> Anslinger to Gaston, 6 February 1934, HAP Box 3, File 6.

<sup>854</sup> Memorandum for Mr Gaston, 12 December 1933, HAP Box 3, File 7; Herbert Gaston, 7 January 1938, HAP Box 3, File 2.

<sup>855</sup> O.W. Hyman to Anslinger, 29 February 1932, HAP Box 3, File 8.

respect was reciprocal in academia. Pharmacologists supported this educational effort.<sup>856</sup> C.H. Thienes from the Department of Pharmacology at the University of Southern California told Anslinger that if “all branches of government were as efficient as yours, tax payers would have little cause for complaint.”<sup>857</sup> For some academics, the Narcotics Bureau stood as the very model of good governance in hard times, succeeding in what Roosevelt aspired to achieve across his administration.

The New Dealers and Anslinger cohered in their strategy of engaging both social and market institutions toward common goals. Here as well pharmacology underscored Anslinger’s connections. The Convention of the National Association of Retail Druggists in New Orleans invited him to speak at its convention.<sup>858</sup> The American Drug Manufacturers Association also invited him.<sup>859</sup> Anslinger concerned himself with threats of unfair competition to established industry, and kept abreast of potentially disruptive discoveries, like non-addictive morphine.<sup>860</sup> He found ideological agreement in this sector. He was “certain” that he had very little difference of opinion with E.F. Kelly, the head of the American Pharmaceutical Association, on the appropriate narcotics legislation.<sup>861</sup> His detractors decried his cozy ties to the drug industry, but this closeness resembled the early New Deal model of corporate relations.

Anslinger preferred pharmacists to doctors. “The druggists as a whole cooperate with us much better,” he said.<sup>862</sup> It is no wonder. Narcotics prosecutions routinely targeted doctors.<sup>863</sup> As with most Bureau targets, Anslinger kept up with the case details.<sup>864</sup> Physicians did not see the Narcotics Bureau as an intractable threat, however. One offered a thousand dollars in exchange for his violations being ignored.<sup>865</sup> Others pushed therapeutic alternatives in direct conflict with the Narcotic Bureau’s approach. In Hollywood, Dr. Edward Williams, member of the International White Cross Anti-Narcotic Association, championed a system of distributing maintenance doses to addicts, a technique Anslinger insisted had “aroused universal condemnation from here and abroad.”<sup>866</sup> While the Harrison Act ensnared physicians who gratuitously prescribed controlled substances, Anslinger held that doctors practicing in good faith had nothing to fear from the law. Anslinger did not approve of doctors who gradually weaned patients off, but he did not support their prosecution. To allow addicts maintenance dosage would, however, be a “gross repudiation of our international obligation” and “surrender. . . the benefits of 22 years of progress.” Those suddenly cut off would survive, according to Anslinger, who cited a study where 1,000 addicts were deprived and none died.<sup>867</sup> His tough love toward addicts was both a repressive and therapeutic approach, a middle ground also occupied by his Democratic counterparts elsewhere in the New Deal state.

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<sup>856</sup> Elmer L. Hammond to H.J. Anslinger, 10 February 1932, HAP Box 3, File 8.

<sup>857</sup> C.H. Thienes to Anslinger, 13 December 1935, HAP Box 3, File 5.

<sup>858</sup> Memorandum for Mr HE Gaston, 4 August 1934, from Anslinger, HAP Box 3, File 6.

<sup>859</sup> Anslinger to Gaston, 5 February 1934, HAP Box 3, File 6.

<sup>860</sup> Memorandum for Assistant Secretary Lowman, 11 February 1933, HAP Box 3, File 7.

<sup>861</sup> Anslinger to E.F. Kelly, American Pharmaceutical Association, 5 September 1932, HAP Box 3, File 8.

<sup>862</sup> Memorandum for Assistant Secretary Gibbons, 30 July 1938, HAP Box 3, File 2.

<sup>863</sup> TJ Crowe, MD, to Anslinger, 17 June 1932, HAP Box 3, File 8.

<sup>864</sup> Joseph A Manning to Commissioner, 10 January 1935, HAP Box 3, File 5.

<sup>865</sup> Wood to Dr Benjamin G Moomaw, Roanoke, 5 March 1935, HAP Box 3, File 5.

<sup>866</sup> Anslinger: Memorandum for Mr. Gaston, 28 June 1934, HAP Box 3, File 6.

<sup>867</sup> Anslinger to Isaac B Ball, 1936, HAP Box 3, File 4.



Some in the medical profession did not see it this way, and indeed pondered whether Anslinger's harshness amounted to conspiracy. Henry Smith Williams suspected that Anslinger planned to provoke doctors' anger "by forcing the rigid interpretation of the Harrison Law," so they would turn against Roosevelt.<sup>868</sup> Henry decried the treatment of his brother Edward as something that "would not be tolerated in Soviet Russia or Hitlerite Germany," and had no place "in the land of the New Deal."<sup>869</sup> Williams thus favored reorganization and a change in personnel. He wanted the Bureau absorbed by the public health service, "where it obviously belongs."<sup>870</sup> As he told the editor of *Colliers*, "a medical man" leading drug policy would more likely leave Hollywood alone, rather than subject men like Edward to character assassination.<sup>871</sup> Williams had company in his urge to save the promise of the New Deal from a punitive drug policy.

While some doctors wanted to oust Anslinger, his pharmaceutical connections helped protect his position within the New Deal state. The APA backed Anslinger against calls to replace him, for he had "shown a real desire to co-operate with the public health professions." They appreciated that he had protected them from "unnecessary and burdensome regulations" and favored his support of the Uniform State Narcotic Act.<sup>872</sup> The Wholesale Druggist Association also supported Anslinger in this endeavor.<sup>873</sup> F.W. Russe of Mallinckrodt Chemical Works suggested to the president that Anslinger served the New Deal agenda of building credible governance. Roosevelt's "energetic, courageous and far-seeing legislative enactments have received universal approval and have restored belief in Democrats and Republicans alike, of the integrity and efficiency in our National Government." He reassured Roosevelt that Anslinger would help maintain this ideal, "irrespective of any financial gain we might have in an inefficient administration of this office."<sup>874</sup>

Anslinger's determination seemingly arose, at least in part, from a genuine belief in the harm of unregulated pharmaceuticals. The humanitarian dimension extended beyond human welfare, clearly emerging throughout his long-term mission to halt the drugging of racehorses, a common practice employed to make the animals run faster and perform despite fatigue and injury. This cause, along with his opposition to the vice of bookmaking, kept him intimately fixated on the industry.<sup>875</sup> He received undercover dispatches on the use of stimulants and narcotics at race tracks, from New Orleans to Coney Island and throughout the country, and became a trusted ally of the industry's reformers.<sup>876</sup> He spoke at the National Association of Racing Commissioners in January 1935.<sup>877</sup> He informed the Florida Racing Commission when a drug investigation turned

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<sup>868</sup> Henry Smith Williams to Mr. Peck, 6 June 1934, HAP Box 3, File 6.

<sup>869</sup> Henry Smith Williams to Thomas H Beck (*Collier's Weekly*) 10 June 1934, HAP Box 3, File 6.

<sup>870</sup> Henry Smith Williams to Mr. Peck, 6 June 1934, HAP Box 3, File 6.

<sup>871</sup> Henry Smith Williams to Thomas H Beck (*Collier's Weekly*), 10 June 1934, HAP Box 3, File 6.

<sup>872</sup> Anslinger to E.F. Kelly, American Pharmaceutical Association, 5 September 1932 HAP Box 3, File 8.

<sup>873</sup> Eugene Brownmeyer to Anslinger, 6 October 1932 HAP Box 3, File 8

<sup>874</sup> Russe to President, 4 April 1933, HAP Box 3, File 7.

<sup>875</sup> Memorandum for Mr, Anslinger In Re Bookmaking 25 March 1937 HAP Box 3, File 3.

<sup>876</sup> To Sir, 19 December 1932, HAP Box 3, File 8; Sir, 13 January 1933—New Orleans Louisiana; From Ralph H Oyler, 17 July 1933; Walter North and Edward Bertin to Oyler, 22 August 1933; Emma K Reily to Anslinger, 1 August 1933, HAP Box 3, File 7 Correspondence (1933); Walle to Anslinger, 27 October 1933; HTN to HJA, 18 October 1933; Meinke to Anslinger, 1(2) November 1933 (Universal Service Inc); Middlebrooks to Anslinger, 20 November 1933, HAP Box 3, File 7.

<sup>877</sup> Anslinger to Gibbons, 5 January 1935, HAP Box 3, File 5.

up counterfeit racing licenses.<sup>878</sup> He kept abreast of reform proposals, like receiving barns that allowed monitoring of horses before races, and saliva tests to identify cocaine, cola nut, heroin, alcohol, caffeine.<sup>879</sup> Many applauded his humanitarian crusade. Veterinarians lauded him.<sup>880</sup> J.V.O. Conor, the president of National Telecast, Inc., cited an *Esquire Magazine* article, “Hopping Horses” and praised Anslinger for his “determined efforts to wipe out this growing evil in a great sport.” Conor promised to broadcast the story to 40,000 to 50,000 listeners.<sup>881</sup>

The effort against horse drugging dovetailed with Anslinger’s focus on internationalism as a rationale for domestic policy. He paid notice to horse drugging from France to Canada, as well as the variations of state policy. Anslinger approved California’s strict regulations, and Texas and Florida’s saliva tests. He shared this interest with William Randolph Hearst, whose newspapers he applauded for their support in stopping “the vicious practice.” Even though the “thought of regulating horse racing” federally faced constitutional constraints, internationalism provided a basis for the national government to encourage state legislation. Thus could horse doping be “completely suppressed in accordance with legislative and treaty commitments.”<sup>882</sup>

The liberal internationalism of interwar drug policy found its proud personification in Anslinger. Narcotics control had developed as a global affair, implemented through economic power and interdiction as much as criminal enforcement. During the Theodore Roosevelt administration, opium control began as a war on an “international scale.” The Opium Advisory Committee of the League of Nations oversaw the manufacture of opium in Turkey, Yugoslavia, Japan and Russia.<sup>883</sup> American ships engaged in the confiscation of opium.<sup>884</sup> The Narcotic Drugs Import and Export Act sometimes provided a regulatory tool to pursue gangsters found not guilty in criminal court.<sup>885</sup> Anslinger embodied the period’s strategic marriage of soft and hard power. He shared the Democrats’ deference to the League of Nations.<sup>886</sup> He was an honorary member in the International Police Chiefs Association.<sup>887</sup> When asked to produce a short autobiographical blurb, Anslinger highlighted his time at the American consulate in Europe, South America, and the West Indies, from 1918 to 1929, and as a delegate and co-observer in the opium advisory committee at the League of Nations, before serving as assistant commissioner of prohibition in 1929 and the head of Narcotics in 1930.<sup>888</sup>

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<sup>878</sup> Anslinger to Walter Donovan, Florida Racing Commission, 5 September 1934 HAP Box 3, File 6.

<sup>879</sup> A Memorandum Suggesting a National Organization of Horse Racing Associations, undated, HAP Box 3, File 6; Buchanan to Anslinger, 1933, California Horse Racing Board; J. William Fink, Vet, to Anslinger, 2 January 1934 Anslinger Papers, Box 3, File 6 Correspondence (1934); AD Stevenson, Narcotic Inspector, to Ralph Yyler, 7 April 1938, HAP Box 3, File 2.

<sup>880</sup> J. William Fink to Anslinger, 2 January 1934, HAP Box 3, File 6 Correspondence (1934)

<sup>881</sup> J.V.O. Conor to Anslinger, 25 June 1936, HAP Box 3, File 4.

<sup>882</sup> Chao to Anslinger, 21 February 1933, HAP Box 3, File 7 Correspondence (1933); Anslinger to Sharman, 22 March 1934, HAP Box 3, File 6 Correspondence (1934); Anslinger to William Randolph Hearst, 23 November 1933, HAP Box 3, File 7; Anslinger to William Randolph Hearst, 23 November 1933, HAP Box 3, File 7.

<sup>883</sup> Herbert L. May, Permanent Central Opium Board, “A Few Words About Opium,” World-Wide Broadcast, 19 August 1933.

<sup>884</sup> Memorandum, 25 September 1931, HAP Box 3, File 8 (1932).

<sup>885</sup> Harry V. Williamson to Anslinger, June 23 1932, Anslinger Papers Box 3, File 8.

<sup>886</sup> To Harry, 13 September 1933, HAP Box 3, File 7.

<sup>887</sup> Anslinger to Walker, 6 July 1933, HAP Box 3, File 7.

<sup>888</sup> Anslinger to Miller, 2 December 1935, HAP Box 3, File 5 Correspondence (1935).

Anslinger's diplomatic reputation and expertise overcame a deep partisan mistrust to help save his job more than once. In 1933, a new international treaty was up for consideration, and the newly elected Roosevelt had to consider whether to retain Anslinger.<sup>889</sup> He caught the ire of Democratic partisans. One detractor suggested Otto Pine as a replacement superior to "Anslinger, one of the charter members of the Hoover Organization."<sup>890</sup> William McDonald endorsed John A. Sheehan.<sup>891</sup> But those who defended Anslinger often emphasized his "technical" and "international" qualifications.<sup>892</sup> E.C. Brokmeyer argued that Anslinger fit the "highly technical" nature of the job.<sup>893</sup> Oscar Ewing stressed Anslinger's international connections as an asset. He was delegate to the 1931 Geneva Conference. Narcotics was seen as a foreign problem, a matter of smuggling, and Anslinger's experience in pressuring Turkey showed his skill.<sup>894</sup>

Friends in high places who endorsed Anslinger's reappointment underscored his influence throughout the federal state. Oscar Ewing worried that "zealous persons" who saw "the war against narcotics as a crusade" would punish him if he turned against the Narcotics chief. He argued that Anslinger had the backing of "every social agency interested in anti-narcotic work," including the Bureau of Social Hygiene, as well as Mrs. Hamilton Wright, widow of the famed opium commission mastermind.<sup>895</sup> The Undersecretary of State William Phillips called Anslinger the "supreme authority" on narcotics.<sup>896</sup> Insiders loyal to Anslinger shared with him "confidential information" on possible replacements.<sup>897</sup>

Shortly after his inauguration, Roosevelt retained Anslinger as Narcotics Bureau chief. Anslinger found himself in a new administration that took the narcotics problem seriously. He was soon warned that should he ever suggest amnesty for drug dealers, he should relinquish his post.<sup>898</sup> If the New Dealers shared his hostility to uncontrolled drug use, Anslinger shared a liberal approach to governance. In proving himself in the first years of the Roosevelt administration, Anslinger drew on his internationalism in arguing for Narcotics Bureau independence and setting a global and domestic agenda. Not only did internationalism along with New Deal sensibilities on crime control save Anslinger his job; they saved the Narcotics Bureau from multiple threats of reorganization.

Soon after reappointing Anslinger, Roosevelt considered major questions of federal restructuring.<sup>899</sup> Drug policy as a whole was in flux.<sup>900</sup> Arguments arose as to whether to deregulate codeine, or if doing so would allow the black-market production of derivative opiates.<sup>901</sup> But the most pressing proposals were on organization, rather than policy. Conflicting commitments in the New Deal war on crime came to a head. One rumored reorganization

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<sup>889</sup> *Pittsburg Post Gazette*, 12 July 1933.

<sup>890</sup> Hon AJ Sbaath, 26 May 1934, OF21, Folder: Narcotics Bureau.

<sup>891</sup> William McDonald to James A Farley, 25 April 1933, OF21, Folder: Narcotics Bureau.

<sup>892</sup> To Miss Mary Deston, 7 March 1933, OF21, Folder: Narcotics Bureau.

<sup>893</sup> E.C. Brokmeyer to Jerry McQuade, 23 November 1932, HAP Box 3, File 8

<sup>894</sup> Oscar Ewing to Martin Conboy, 21 December 1932, HAP Box 3 File 8.

<sup>895</sup> Oscar Ewing to Martin Conboy, 21 December 1932, HAP Box 3 File 8.

<sup>896</sup> UnderSec of State William to Anslinger, 9 March 1933, HAP Box 3 File 7.

<sup>897</sup> Lexy Ford to Anslinger, 5 March 1933, HAP Box 3 File 7; To Lexy Ford, 7 March 1933, HAP Box 3 File 7.

<sup>898</sup> Musto, *The American Disease*, 212.

<sup>899</sup> *Altoona Mirror*, 18 March 1933, HAP Box 3 File 7.

<sup>900</sup> Memo for the Under Secretary of State, 20 April 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>901</sup> Will S. Wood to Royal S. Copeland, HAP Box 3, File 8 (1932).

proposal was to bring all investigative agencies under the Justice Department.<sup>902</sup> But equally compelling arguments circled around consolidating control under the Treasury. The end of alcohol prohibition and Roosevelt's mandate appeared the perfect time to finally subordinate the discredited Treasury institutions, tainted by years under Andrew Mellon and the Republicans, under a centralized unit that Morgenthau could more easily manage. Lawrence Dunham of the Bureau of Social Hygiene, who saw international cooperation as necessary to narcotics control, favored reorganization. He pointed to the complicated mess of twenty-nine federal police departments and urged general consolidation.<sup>903</sup> Louis Ruppel, the Deputy Commissioner of Narcotics, also favored restructuring, and specifically thought the Treasury Department the proper venue for major changes. He thought a "federal police department," if independent "from all existing bodies," could enforce "all Federal laws." This would harmonize the Customs Service, Narcotics Bureau, Division of Investigation, Park Police of the Interior, Internal Revenue agents, Secret Service, the Coast Guard, and Labor investigators. Although the Treasury collected taxes, its agents also enforced "narcotic and liquor laws." Ruppel complained of the interagency inefficiency, where different agencies failed to share evidence and criminals got away. If every agency were like the Narcotic Bureau, "hundreds of totally inefficient Government officers" could be fired. But he opposed the Justice Department running a "Federal Police Department. . . on the same ground that the District Attorney, or County Attorney, or Commonwealth Attorney" did not have "jurisdiction over the country, city, or state police."<sup>904</sup>

Such concerns about American federalism as well as the very international commitments that justified vigilance against narcotics in fact undercut the argument for Treasury consolidation. The delicate requirements of jurisdiction mattered profoundly to drug policy. Although Anslinger himself recognized the need for reform, he jealously defended his bureau's independence. He liked the idea of a central investigative unit but he believed local police should handle most enforcement.<sup>905</sup> He also stressed that "treaty obligations" mandated the Narcotics Bureau's independent role. In invoking this internationalist rationale, he insisted he was "arguing for a principle and not for a job." Not for the last time he focused on the 1931 Geneva Convention's obligation of an independent narcotics agency, insisting that merging of the Bureaus of Industrial Alcohol and Narcotics with the Bureau of Internal Revenue would violate the mandate.<sup>906</sup> Anslinger's closest, powerful ally in this argument was the loyal Democrat Richmond Hobson. The World Narcotic Defense Association, headed by Hobson, sent Anslinger resolutions against the reorganization ideas.<sup>907</sup>

Anslinger complemented his internationalist case with a more general appeal to war on crime liberalism—the integration of soft and hard power in furtherance of enforcement. Defending the status quo, he outlined a holistic approach to drug regulation. The Harrison Narcotic Act was not principally a criminal statute, Anslinger insisted. Its regulatory purposes had originated with the convening of the Secretaries of State, Commerce, and Treasury. Working closely with the

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<sup>902</sup> To Alf Oftedal, 10 March 1933, HAP Box 3, File 7.

<sup>903</sup> Lawrence Dunham (Bureau of Social Hygiene) to Louis Howe, 12 April 1933, OF431, Folder: Narcotics, 1933–1943.

<sup>904</sup> Memorandum for the President, and the Acting Secretary of the Treasury, from Ruppel, 28 November 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>905</sup> Musto, *The American Disease*, 213.

<sup>906</sup> To Russe, 15 February 1933, HAP Box 3 File 7.

<sup>907</sup> Williamson to Anslinger, 3 March 1933, HAP Box 3, File 7.

Bureau of Internal Revenue, the Narcotics Bureau was as much a fiscal instrument as an enforcement agency. It also had ties to the Public Health Service and Customs Bureau. Many of its activities had “no direct connection with criminal law enforcement.” The “detection and prevention of narcotic law violations” were in fact small parts of its operations. Anslinger hoped that in the event of any merger, criminal enforcement would “be separated from the regulatory and international functions.” He hoped the penal provisions, if they went to the Justice Department, would allow the Narcotics Bureau to maintain supervisory and international functions.<sup>908</sup> As Anslinger lashed out at the merger idea, his ally A.E. Blanco decried it as “false economy.”<sup>909</sup> Despite his depictions as an anomalous advocate of repression in Roosevelt’s decade, Anslinger in fact deemphasized criminalization and stressed economic regulation in fighting for his seat at the table. Along with Hobson, a group of 17,000 retail druggists rallied for Anslinger, sending a petition that opposed the reorganization.<sup>910</sup>

After the Under Secretary of State inquired about the proposed merger, an April 20 memo circulated within the Treasury reassuring that there was “no intention of abolishing or merging” the bureau, given the Treaty obligations.<sup>911</sup> Anslinger and Hobson won the battle, saving the Narcotics Bureau against the first major peril.

After withstanding about a year of threats to his Bureau’s independence and his job, Anslinger could now enjoy his vindicated prestige, as mutual international and domestic policy priorities made him a valued state-builder in the New Deal war on crime. Having faced down the first threat of restructuring, Anslinger and his regional officials began consolidating their power even as they faced challenges of bureaucratic volatility. They hoped for budget increases, but in addition to Roosevelt’s mandate for 15% salary reductions, a tightening budget required general cuts. Anslinger’s Bureau lost \$400,000 from its \$1,400,000 budget.<sup>912</sup> The National Economy program cut spending on narcotic enforcement. Professional Baptists no less than the Bootleggers saw their jobs slip away. As McAdoo assessed it, criminals involved in “rum-racketeering” had moved over to “narcotic smuggling.”<sup>913</sup> Similarly, former liquor officials sought jobs pursuing other intoxicants. An official at the Commission of Public Works tried to procure a narcotics job for Bryon Newton, a former prohibition agent.<sup>914</sup> But even a personal recommendation from a such a venerated official as U.S. Attorney Charles H. Tuttle could not secure a job. Louis Ruppel, the Deputy Commissioner Narcotics Bureau, resisted a flood of more than two hundred unemployed Volstead enforcers looking for work. He admitted to being “undiplomatic enough” to insist the Narcotics Bureau “would not become the dumping

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<sup>908</sup> Anslinger to Dunham, 10 April 1933, HAP Box 3 File 7.

<sup>909</sup> Anslinger to Russe, 5 April 1933, HAP Box 3 File 7; Blanco to Anslinger, 19 April 1933, HAP Box 3 File 7.

<sup>910</sup> Retail druggists to Lewis W Douglas 6 April 1933 HAP Box 3, File 7.

<sup>911</sup> Hon Phillips, Under Sec of State, 12 April 1933, OF21 Box 19, Folder: Narcotics Bureau; Memo for the Under Secretary of State, 20 April 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>912</sup> Walker to Anslinger, 30 October 1933, HAP Box 3 File 7; Memorandum for Colonel Louis McHenry Howe, 27 November 1933, OF 21; Louis Ruppel, Deputy Commissioner of Treasury Dept, , OF21 Box 19, Folder: Narcotics Bureau.

<sup>913</sup> McAdoo to Mr. President, 27 October 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>914</sup> Hallerman, Commission of Public Works, to Byron Newton, 16 November 1933, OF21 Box 19, Folder: Narcotics Bureau.

ground.”<sup>915</sup> The Narcotics Bureau would chart its own destiny, freed from the deterministic bureaucratic inertia of alcohol prohibition and legalization.

As soon as the budget cuts went into effect, the New Dealers began convincing themselves to reverse course. Senator William McAdoo, a stalwart progressive, saw narcotic enforcement as an issue of “grave importance” and wanted more money to combat drugs in California.<sup>916</sup> Others informed Roosevelt of the need for more personnel.<sup>917</sup> Roosevelt acknowledged the concern, and asked the Director of the Budget for input on appropriations.<sup>918</sup> Louis Howe, who saw austerity as an opportunity for “big house cleaning,” nevertheless found the argument for more customs agents on the Pacific Coast compelling. Howe eventually signaled an increase for 1935 by \$150,000 up to \$1,194,899.<sup>919</sup> Despite the austerity of the early New Deal, the narcotics funding began ratcheting back upward.

As his Bureau gained stature within the New Deal state, Anslinger continued to best his partisan detractors. Some attempting to replace him indulged in such personalized resentment and jockeying for favoritism as to make Anslinger appear devoted to the public good in contrast. Louis Ruppel, the Democrat and Deputy of Narcotics control, also hoped for a different boss, suggesting Charles Hand with the Hearst organization. Another suggestion was Deputy Police Commissioner Phily Hoyt, despite his connections to Tammany Hall.<sup>920</sup> Another man, Walter F. Enfield, wanted the job, touting his pedigree as “a real Democrat, a New Dealer,” in contrast to the Republican “married into the Andrew Mellon family,” and indeed blamed Anslinger for lenient enforcement. He suspected a Republican conspiracy of weak enforcement so as to spark an uproar against the president.<sup>921</sup> He appealed directly to Roosevelt, giving his life story and stressing his work against addiction and lack of “glaring defects.”<sup>922</sup> Despite the persistence of Anslinger’s detractors, his influence reached deep into the new administration and the war on narcotics coalition. Cummings took his boosters seriously.<sup>923</sup> Anslinger’s allies were well situated to keep him abreast of his enemies. One eager man asked for a major pharmaceutical industry leader’s support in replacing Anslinger, but his correspondent loyally passed the letter on to Anslinger, indicating that replacing him would harm the “public health through inefficient enforcement.” Anslinger was “unusually efficient” and uncorrupted by “influence, political or otherwise.”<sup>924</sup>

Anslinger and his unscathed Narcotics Bureau continued to serve the administration in its international relations. The modern world, where narcotics control had to transcend borders,

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<sup>915</sup> Memorandum for Colonel Louis McHenry Howe 27 November 1933, OF21 Box 19, Folder: Narcotics Bureau; Louis Ruppel, Deputy Commissioner of Treasury Department, OF21 Box 19, Folder: Narcotics Bureau.

<sup>916</sup> WG McAdoo to President, 31 October 1933, OF21 Box 19, Folder: Narcotics Bureau; 31 October 1933, OF431, Folder: Narcotics, 1933–1943.

<sup>917</sup> Memorandum for the President, 29 December 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>918</sup> Roosevelt, Memorandum for The Director of the Budget, 30 October 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>919</sup> Newton to Howe, 22 November 1933, OF21 Box 19, Folder: Narcotics Bureau; Howe to Senator McAdoo, 2 January 1934, OF21 Box 19, Folder: Narcotics Bureau.

<sup>920</sup> Memorandum for the President, Louis Ruppel, 28 November 1933, OF21 Box 19, Folder: Narcotics Bureau.

<sup>921</sup> Walter F. Enfield to McHenry Howe, 15 May 1934, HAP Box 3, File 6.

<sup>922</sup> Enfield to Roosevelt, 21 March 1933, HAP Box 3, File 6.

<sup>923</sup> Cummings to Hobson, 5 April 1933, HAP Box 3, File 7.

<sup>924</sup> Berger to Mallinckrodt Chemical Works 21 November 1933; Berger to Russe, 28 November 1933; Russe, Mallinckrodt Chemical Works, to HAP 19 Dec 1933, HAP Box 3, File 7; Russ to Berger, 24 November 1933, HAP Box 3, File 7.

continued to highlight the importance of Anslinger's global consciousness. American leaders anxiously sought to court foreign leaders. They urged the Soviet Union to enforce opium conventions.<sup>925</sup> The broader federal bureaucracy recognized Anslinger's diplomatic value. The State Department had authorized him in 1933 to attend the Seventeenth Session of the Opium Advisory Committee of the League of Nations.<sup>926</sup> Anslinger paid close attention to Canada, where problems included infections from injections, challenges in centralizing codeine control, and doctors permissively allowing heroin abuse.<sup>927</sup> The Bureau worried about opiates from Japan, where pharmaceutical houses were having narcotics diverted.<sup>928</sup> The Japanese front offered opportunities for interagency and international cooperation. Seizures from Japanese peddlers in California brought together the Customs Bureau and Narcotics Bureau.<sup>929</sup> The United States appealed to Japanese narcotics efforts as a way to "remove some of the criticism" they received when it came to opium abuse.<sup>930</sup> Anslinger called one man, a Mr. Kusama, "the best Jap I know."<sup>931</sup> Even Anslinger's crude racism celebrated international participation rather than nativist isolation.

In his attention to the developing world, Anslinger paid heed to social knowledge in shaping drug enforcement. He took seriously Egypt's report that insufficient attention by the world's governments had allowed the illicit narcotic market to flourish.<sup>932</sup> He kept abreast of narcotics control literature distributed in Calcutta.<sup>933</sup> The discourse of international narcotics control echoed New Deal criminology's holistic focus on poverty and social dysfunction. In a global analog to the domestic trajectory, officials began to doubt the centrality of poverty in opiate use abroad. Some associated abuse with sexuality, that female circumcision caused a "sex crisis" and opiates were used as an alternative.<sup>934</sup> However misguided, scientific inquiry rather than brute force alone guided the formation of drug policy.

Anslinger's ally Richmond Hobson, heading the World Narcotic Defense Association, helped set the global agenda. In November 1933 Hobson issued Recommendation XII, a report to his association, hoping to urge FDR and Congress to create a Council for Applied Education—as well as to investigate economic crises, crime, and social disease. A new Department of Social Reconstruction would advance the Public and General Welfare with many bureaus—a Bureau for Narcotics, a Bureau for Alcohol, a Bureau for Health and Hygiene, and Bureau for Lawlessness and Crime, a Bureau for Economic Problems, both national and international, and an Education and Social Relations Bureau with a Child Welfare Division.<sup>935</sup> Hobson thought Russia and East Asia were the next step in "the Narcotic War," and lamented the long list of

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<sup>925</sup> Howe, Cable from Geneva, 18 November 1933, OF431, Folder: Narcotics, 1933–1943.

<sup>926</sup> Assistant Sec. of State to Anslinger, 8 May 1933, HAP Box 3 File 7.

<sup>927</sup> Anslinger to CHL Sharman, Chief Narcotic Division Ottawa Canada, 28 April 1934, HAP Box 3 File 6; Sharman to Anslinger, 21 October 1936, HAP Box 3, File 4.

<sup>928</sup> Anslinger to F.H. La Guardia, 20 September 1932, HAP Box 3, File 8; Memorandum for Mr McReynolds, 1 October 1937, HAP Box 3, File 3.

<sup>929</sup> National HJ Anslinger Invited to address Temple University, 20 April 1933, HAP Box 3, File 7.

<sup>930</sup> AB Blanco to Sato, 6 March 1937, HAP Box 3, File 3.

<sup>931</sup> Anslinger to Sanborn Young, 25 March 1938, HAP Box 3, File 2.

<sup>932</sup> Memorandum for Acting Assistant Secretary, Report for week ended March 25, 1933, HAP Box 3, File 7.

<sup>933</sup> Attention: Bureau of Narcotics, 5 June 1935, HAP Box 3, File 5.

<sup>934</sup> Dear Russell Pacha, 16 January 1934, Anslinger Papers, Box 3, File 6.

<sup>935</sup> Recommendation XII, Report of President to Members and Board of Directors of World Narcotics Defense Association, Held 29 November 1933, OF431, Folder: Narcotics, 1933–1943.

countries that had failed to sign on—“Afghanistan, Australia, China, Japan, Siam; Abyssinia, Liberia, Union of South Africa; Austria, Estonia, Finland, Latvia, Luxemburg, Norway, Greece, Russia, San Marino, Yugoslavia; in America: Honduras, Panama, Argentina, Bolivia, Columbia (sic), Paraguay, Venezuela.”<sup>936</sup> Hobson wanted the United States to send commissioners to Latin America, East Asia and Europe, in a proposal Roosevelt considered impractical.<sup>937</sup> But the administration respected Hobson’s organization, and in 1935 Cummings asked Roosevelt to contribute to the radio address for the association.<sup>938</sup> Despite differences on details, the ideal of international cooperation unified America’s drug warriors.

Through Roosevelt’s first term, the increasingly valued Narcotics Bureau and the internationalism of drug control served the federal government in pushing its structural limits in encouraging a drug war at home. The internationalism always returned to the inward policy goal. In particular, the Uniform Narcotic Law allowed the Treasury Department and Narcotics Bureau to draw on treaty obligations to expand their domestic reach. This model legislation, adopted by the states, would allow the federal government to guide drug policy without overstepping its constitutional limits. It could facilitate nationwide marijuana prohibition without a federal statute, effectively circumventing the “difficulties which arise out of our Constitutional division of sovereignty.”<sup>939</sup> The Uniform Narcotics Law also furnished a reinforcing rationale for preserving an independent Narcotics Bureau. Hobson assured Roosevelt that the law would “throw into the fight, the full organized Police power of our country.” The coordination of the amplified state-level enforcement would make new work for the Bureau.<sup>940</sup> Because of divided sovereignty and the federal legislation that formed the basis of the treaty itself, the Uniform Act took on central importance.

The drive for uniformity benefited from momentum as well as the governing philosophy of the New Deal. During the lame duck period of Herbert Hoover’s presidency, the Narcotics Bureau made a concerted effort of outreach to the individual states. Shortly after Roosevelt’s election, Anslinger sent out more copies, hoping to elicit support.<sup>941</sup> The 42<sup>nd</sup> Annual Conference of the Commissioners approved the Uniform Narcotic Act.<sup>942</sup> Grassroots groups like the Anti-Narcotic Society in San Francisco eagerly asked for more copies.<sup>943</sup> The more groups supported it, the easier it was to advocate. A pamphlet titled “Why the Legislatures Should Enact the Proposed Uniform Narcotic Drug Law”<sup>944</sup> pointed out that the legislation was supported by the Conference of Commissioners on Uniform Laws, the ABA, the House of Delegates of the AMA, the National Drug Manufacturers’ Association, the National Association of Retail Druggists, the National Kiwanis, the General and State Federation of Women’s Clubs, the City Federation of

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<sup>936</sup> Hobson, World Narcotic Defense Association, to Roosevelt, 19 October 1933, OF431, Folder: Narcotics, 1933–1943.

<sup>937</sup> To Richmond P. Hobson, 11 November 1933, OF431, Folder: Narcotics, 1933–1943.

<sup>938</sup> Attorney General, March 15 1935, OF431, Folder: Narcotics, 1933–1943.

<sup>939</sup> Musto, *The American Disease*, 216; Memorandum in Favor of Proposed Uniform Narcotic Drug Act, HAP Box 3, File 6.

<sup>940</sup> Hobson to Roosevelt, 8 April 1933, HAP Box 3, File 7.

<sup>941</sup> Anslinger to CB Pinkham, 27 December 1932, RG 170 DEASF Box 95.

<sup>942</sup> William B. Hornblower to Bureau of Narcotics 28 March 1933, RG 170 DEASF Box 95.

<sup>943</sup> Field Secretary, Anti-Narcotic Society on 580 Market Street, SF, 5 January 1932, RG 170 DEASF Box 95.

<sup>944</sup> Camp to Wood, 3 April 1935, DEASF Box 95.



Women's Clubs and the National Parent-Teacher Congress.<sup>945</sup> Outreach to the National Kiwiniis Club got support from at least one chapter, in East Oakland.<sup>946</sup> The law also had the support of the American Bar Association, the American Medical Association, the Federation of Women's Clubs, and the National Congress of Parent Teachers Association.<sup>947</sup> The Uniform Narcotic Law provided a common vocabulary for civic organizations to champion a purportedly international agenda.

The Narcotics Bureau and World Narcotic Defense Association did most of the heavy lifting. Hobson's organization sent all the states arguments about the Geneva conventions. A typical letter called for uniformity, noted the opportune time of the treaty, urged ratification and suitable legislation in each country.<sup>948</sup> Narcotic agents on the ground repeated the rehearsed pitch: The AMA supported this law, which would help stem blackmail and fraud and feed the state coffers with confiscated money. But the main argument was jurisdictional. The Hague agreement required American compliance, and the Uniform Law would harmonize federal and state authorities, allowing them finally to fix the "twilight zone" of enforcement.<sup>949</sup> As of February 1935 the Uniform Narcotics Law was on the books in Nevada, New York, Florida, New Jersey, Virginia, Rhode Island, South Carolina, Kentucky, and Louisiana.<sup>950</sup> If Hobson and Anslinger could continue their work the successes would presumably multiply.

Sometimes states mounted resistance. As Anslinger had lamented, while groups like the AMA, the Druggists Association, the Bar Association, and the Hearst newspapers understood the legislation's importance, most states did not.<sup>951</sup> Some states found themselves content to maintain their own laws.<sup>952</sup> The Washington State Assembly pushed a different model—supported by Eunice Fisher of SF White Cross—including the rationing for addicts.<sup>953</sup> On the other hand, California, which Anslinger regarded a model state, needed little motivation to strengthen its own laws.<sup>954</sup> When California State Senator Dan E. Williams assured Anslinger that his state's laws were sufficient, Anslinger agreed that California stood out as a leader and indeed said the materials were sent to California by mistake.<sup>955</sup> California already had "one of the most effective in the United States."<sup>956</sup> The governor nevertheless supported most of the Uniform Laws, while pocket vetoing two of them.<sup>957</sup>

But California's vigilance was unusual. Alabama was a tougher nut to crack. The Narcotics Bureau sent an agent to elicit support in Alabama, Tennessee, and other parts of the South.<sup>958</sup> Although the governor and state medical association supported the effort, as did a unanimous

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<sup>945</sup> "Why the Legislature Should Enact the Proposed Uniform Narcotic Drug Law," RG 170 DEASF Box 95.

<sup>946</sup> To Irving W. Mabie, 8 May 1933, Herbert D Wise to Commissioner 9 June 1934, HAP Box 3, File 6.

<sup>947</sup> Report for the week ended 8 April 1933, HAP Box 3, File 7.

<sup>948</sup> Hayne Davis to Governor, 15 January 1934, HAP Box 3, File 6.

<sup>949</sup> Physicial-Inspector E.G. Camp to Hamp Draper, June 1935, DEASF Box 95.

<sup>950</sup> Will Wood to Camp, 9 Feb 1935, RG 170 DEASF Box 95.

<sup>951</sup> To Mrs. Bradford, President Parent & Teachers Organization, 9 May 1933, HAP Box 3, File 7.

<sup>952</sup> McWilliams identifies four reasons why states resisted the Uniform Narcotics Drug Act, but does not include basic resistance to federal usurpation of state-level authority. McWilliams, *The Protectors*, 52.

<sup>953</sup> Sanborn Young to Anslinger, 18 February 1935, RG 170 DEASF Box 95.

<sup>954</sup> *Washington Herald*, 6 April 1933, RG 170 DEASF Box 95.

<sup>955</sup> Kim A Smith, Private Sec to Anslinger, 31 March 1933, RG 170 DEASF Box 95; To Governor James Rolph, 7 April 1933, RG 170 DEASF Box 95.

<sup>956</sup> Anslinger to JW McNeil 30 September 1934, RG 170 DEASF Box 95.

<sup>957</sup> Joseph A Manning to Anslinger, 11 August 1937, RG 170 DEASF Box 95.

<sup>958</sup> Bliss to Wood, 31 May 1935, RG 170 DEASF Box 95.

resolution from the Alabama State Pharmaceutical Association committee, the legislation required approval from State Health Officer J. N. Baker.<sup>959</sup> Described by Elizabeth Wright as “a Virginian and a stickler for States Rights,” Baker saw the bill as unwelcome federal meddling.<sup>960</sup> Baker thought Alabama had an “efficient and satisfactory narcotic law” and did not need “outside guidance or interference.”<sup>961</sup> He maneuvered to get E. L. Camp, the Narcotics Bureau representative, removed.<sup>962</sup> Anslinger stuck by Camp, saying he should be “commended rather than reprimanded for his efforts,” and insisted Baker was the real problem.<sup>963</sup> Although Hobson was sanguine about passage, Baker had voting indefinitely postponed, demonstrating his ignorance in thinking cannabis and marijuana were different drugs.<sup>964</sup> Anslinger pointed to congressional mandates of cooperation between Treasury and the States—twenty-seven states passed the bill without medical opposition—and promised Camp would leave him alone.<sup>965</sup> In September the bill finally passed.<sup>966</sup> Without forcing Alabama to relinquish sovereignty, the administration’s soft power persuaded the state to adopt national and international norms.

Through 1934 and 1935, Anslinger’s policy successes and shared goals continued to win over the Roosevelt administration, overcoming more than partisan divisions. Controversy returned in late 1934 when Anslinger shocked the White House’s conscience by calling a suspect a “ginger-colored n\*gger.”<sup>967</sup> One man identified an “avalanche of protest against Mr. Anslinger.”<sup>968</sup> Roosevelt nevertheless decided to stand by Anslinger. Despite their differences over outward racism, they agreed on the Uniform Narcotics bill. More generally, internationalism solidified his place in the war on crime coalition. Half a year later Roosevelt sounded much like Anslinger, minus the outward racism. In a prepared official statement read publicly by Cummings in 1935, the president urged the states to incorporate the Geneva Narcotic Limitation Convention prohibitions. By doing so the state legislatures could “give to their own people far better protection than they now have against the ravages of the narcotic drug evil” while assisting “the hands of the United States in its efforts to aid them and to further combat this evil abroad” through international collaboration. The administration championed drug control for “the promotion of the welfare of our people and the peoples of other lands.”<sup>969</sup> Anslinger and Roosevelt came from different parties and had immensely different personal styles, but their shared policy destiny held them together through the early New Deal.

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<sup>959</sup> Camp to Greeson, 29 May 1935, DEASF Box 95; E.L. Camp to Greeson, DEASF Box 95; EL Camp to Greeson, New Orleans, 8 January 1935, DEASF Box 95; EL Camp to J.B. Greeson, Received 4 January 1935, DEASF Box 95.

<sup>960</sup> Elizabeth Wright to Anslinger, DEASF Box 95.

<sup>961</sup> J.N. Baker to Anslinger, 17 July 1935, DEASF Box 95.

<sup>962</sup> EL Camp to Greeson 9 August 1935, DEASF Box 95.

<sup>963</sup> Anslinger to Honorable Draper, 26 July 1935, DEASF Box 95.

<sup>964</sup> Hobson to Anslinger, 25 July 1935, DEASF Box 95; Camp to Greeson, 17 August 1935, DEASF Box 95.

<sup>965</sup> Anslinger to Baker, 24 July 1935, DEASF Box 95.

<sup>966</sup> Camp to Gresson, 16 Sept 1935, DEASF Box 95.

<sup>967</sup> McWilliams, *The Protectors*, 84.

<sup>968</sup> Vann to Howe, 17 December 1934, OF21 Box 19, Folder: Narcotics.

<sup>969</sup> “Roosevelt Asks Narcotic War Aid,” *New York Times*, March 21, 1935.

## Beyond the Narcotics Bureau

While fighting for his Bureau's independence and championing the Uniform Narcotic Law, Anslinger also cooperated with New Deal agencies outside his direct control. Even as his detractors fantasized about subsuming his outfit under Morgenthau's Treasury Department, Anslinger's approach, a mix of collaboration and jurisdictional deference, situated him comfortably within the bureaucracy. In three areas where he did not drive policy—cola regulation, treatment facilities, and tax collection—he nevertheless exercised influence by balancing jurisdictional deference and his moderately activist role in state building. Across these issues, the Narcotics Bureau maintained a peculiarly liberal approach that incorporated hard power with a respect for the limits of legal coercion. These policies committed Morgenthau and Anslinger to one another's agendas while revealing an active New Deal drug war independent of the Narcotic Bureau.

Cola regulation brought together the experimental and cooperative threads of New Deal governance. Coca-Cola presented a challenge to the interplay between international legal positivism and corporate relations. Legislation from 1930 allowed for medical use a limited importation of coca leaves, which were then destroyed under Narcotics Bureau observation. Merck & Company imported the java variety and Maywood Chemical imported the Peruvian variety. Maywood also had license to import "special" leaves to decocanize.<sup>970</sup> The Harrison Narcotics Act allowed an exception for decocanized coca leaf derivatives that were no longer psychoactive. But while decocanized leaves were permitted in the cola formula, no such exemption existed in the Narcotic Drugs Import and Export Act from 1922, which completely prohibited trade of any extractive, including Coca-Cola's Merchandise No. 5. After a confusing interception of Coca-Cola by Canadian authorities, Anslinger personally discussed the application for coca leaves with Maywood Chemical.<sup>971</sup> Maywood insisted that exporting Coca-Cola with Merchandise No. 5 would not alter cocaine demand, which already outstripped the need for residual decocanized leaves.<sup>972</sup> The law had allowed the importation of extra "special" leaves to for making cola, but this was unnecessary to meet cola demand.<sup>973</sup> In September officials reasserted the export ban on Merchandise No 5.<sup>974</sup>

As Anslinger recommended, Coca-Cola petitioned for reconsideration. The company had asked for special treatment before. Coca-Cola requested official public relations help in rebutting claims that its product was a narcotic or contained opium. The business offered to "reimburse" Congressman Robert L. Ramsey if "any expense attached to" such a federal report.<sup>975</sup> In its petition for reconsideration, Coca-Cola argued that U.S. law had inspired the Geneva Convention of 1931 in the first place, and to deny the 1922 law's more specific purpose would serve "to reject the reiterated statements of responsible statesmen in committee hearings." The 1936 Report of the Bureau of Narcotics conceded that Coca Cola's ingredients were not narcotic. Coca Cola decried as incoherent the positive law's finding that "this non-narcotic flavoring extract"

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<sup>970</sup> Louis Ruppel, Acting Commissioner, to Kola Highball, Chicago Illinois, 11 May 1934, RG 170 DEASF Box 63.

<sup>971</sup> Anslinger to Maywood Chemical Works, 14 September 1934, RG 170 DEASF Box 63; Anslinger to Maywood Chemical Works, 3 October 1934, RG 170 DEASF Box 63.

<sup>972</sup> To Mr. Alfred Tennyson, Maywood Chemical Works, 21 August 1934, DEASF Box 63.

<sup>973</sup> Donald E Corbett to Bureau of Narcotics, 24 March 1935, DEASF Box 63.

<sup>974</sup> Head, Narcotic Section: Memorandum for Mr. Opper, 113 September 1934, DEASF Box 63.

<sup>975</sup> Coca Cola Bottling Company, EL Earle, to Congressman Robert L Ramsey, 28 June 1933, RG 170 DEASF 63.

would be permitted and “encouraged” for “all our own citizens” but when “consigned to a foreigner beyond our border, it would become a ‘narcotic drug.’”<sup>976</sup> The Treasury Department finally allowed an exception. The vice president of Coca-Cola thanked Anslinger for his ““good will” and vowed the company’s support of “every project looking to the enhancement of the prestige of the Bureau that has been so well developed under your distinguished leadership.”<sup>977</sup> Mediating the regulatory powers of the Treasury, Anslinger had succeeded in smoothing over relations between Coca-Cola and the New Deal state.

Coca-Cola’s critics also provoked the Narcotics Bureau to consider its proper scope of authority. Concerned Americans wrote to the Internal Revenue Department and the Department of Agriculture asking for assurance that the soda contained no cocaine or “remaining alkaloids.” Sometimes these letters found their way to the Narcotic Bureau. Those concerned that Coca-Cola was habit-forming were referred to the Department of Agriculture.<sup>978</sup> Anslinger insisted that he cared only about cocaine, not alkaloids, which the Food and Drug Administration regulated.<sup>979</sup> It became Bureau practice to assert concern only about cocaine and to point to the FDA for other questions.<sup>980</sup> This included complaints about caffeine.<sup>981</sup> As he had argued in fighting to keep his job, Anslinger’s respect for regulatory nuances snugly secured him in the New Deal administration.

Anslinger balanced a jurisdictional deference with intimate involvement in select cases. The Narcotics Bureau whenever implicated took legal questions seriously, such as the destruction of leftover leaves for a discontinued product.<sup>982</sup> When Coca Cola complained about a knock-off by “Vera-Cola,” Anslinger worried about possible violations. It turned out an injunction had already halted the product.<sup>983</sup> The Bureau mulled over questions of extracts as interstate commerce.<sup>984</sup> Sometimes Anslinger personally involved himself, specifically requesting tests for extracts. Usually Anslinger found no violations using decocanized leaves.<sup>985</sup> In one case a mysterious extract turned out to be chestnut leaves.<sup>986</sup> One investigation into Browne Corporation’s Brownie Cola, Sparkling Kola, previously known as Brown’s Beverages, discovered the decocanized leaves came from Merck.<sup>987</sup> Anslinger believed the decocanized leaves were safe and told concerned businesses they did not need to register to use them.<sup>988</sup> On numerous occasions, Anslinger found himself deferring to other agencies. Sometimes Narcotics officials asked the FDA to check out violations of the Pure Food and Drug Act.<sup>989</sup> He sought fair enforcement of the

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<sup>976</sup> DEASF: CocaCola.

<sup>977</sup> Ralph Hayes, VP Coca Cola, 20 April 1937, HAP Box 3 File 3.

<sup>978</sup> Wood to William Edwards, 2 September 1930, Anslinger to Chief, Food, Drug and Insecticide Administration, 8 October 1930, DEASF Box 63.

<sup>979</sup> A. Marsulli to Internal Revenue Dept., 18 January 1935; O.A. Marzulli to J.E. Sale, U.S. Dept. of Agriculture, 8 January 1934; Anslinger to O. A. Marzulli, January 1934, DEASF Box 63.

<sup>980</sup> Attention: M. E.L. Earle, July 1933, DEASF Box 63.

<sup>981</sup> Anslinger to EB Jelks, Cotton Belt Drug Company, 24 September 1930, DEASF Box 63.

<sup>982</sup> John F Day to Tennyson, 12 July 1936, DEASF Box 63; Tennyson to Day, 15 July 1936, DEASF Box 63.

<sup>983</sup> Anslinger to Frank Igoe, DEASF Box 63; George B. Coffill to Ifoie, 16 March 1934, DEASF Box 63.

<sup>984</sup> Attention: Food and Drug Administration, 1934, DEASF Box 63.

<sup>985</sup> Anslinger to John F. Day, Maywood Chemical Works, 12 August 1936, DEASF Box 63.

<sup>986</sup> Igoe to Commissioner of Narcotics, 7 April 1934, DEASF Box 63; Igoe to Commissioner of Narcotics, 7 April 1934, DEASF Box 63; Stephen B. Gibbons to Secretary of Agriculture, 17 April 1934, DEASF Box 63.

<sup>987</sup> J. DeLoon Sullivan to John Walton, 10 August 1936, DEASF Box 63.

<sup>988</sup> Anslinger to Mr. S Isarow, 18 December 1930, DEASF Box 63.

<sup>989</sup> R.Y. Tugwell to Secretary of Treasury, 19 April 1934, DEASF Box 63.

law and did not want extra work for himself. Far from pushing indiscriminate repression, Anslinger took the role of a policy wonk.

Coca-Cola's competitors and detractors also posed challenges that united New Dealers and Anslinger in mutual frustration. Many wanted to mimic Coca-Cola's formula, and others wrote directly to the Bureau decrying cola consumption. Cola entrepreneurs in the 1930s unreservedly asked the Narcotics Bureau for help in procuring cocaine extract.<sup>990</sup> Typically, the Bureau would respond with a reminder of the law, and point them to the legal business model.<sup>991</sup> John S. Owens, attempting to track down a discontinued extract formula, took such notice stubbornly.<sup>992</sup> Owens clarified that his letter was a "personal" appeal that a Narcotics official reveal the formula.<sup>993</sup> Ruppel responded, perhaps too subtly, that the Narcotics Bureau would be in an "embarrassing position" assisting in the procurement of a possibly illegal formula. Owens reiterated his plans to ask the Narcotics official to directly obtain the formula from Merck.<sup>994</sup> Ruppel told both Owens and the official not to work with each other.<sup>995</sup> Although once a detractor of Anslinger's, Ruppel shared the Bureau chief's deference to the law.

Outside the Narcotics Bureau, the Treasury Department's Public Health Service undertook a treatment policy whose reliance on rehabilitation, detention, and coordination well encapsulated New Deal governance. The initiative to build Narcotics Farms began before Roosevelt took office, soon after which he received an invitation to attend the first opening. The first Farm was in Lexington, the second in Fort Worth, although Lexington was not scheduled to operate until April 1935.<sup>996</sup> Roosevelt applauded such farms as "a new and most helpful direction."<sup>997</sup> Eligible inmates included both those federally convicted of narcotics offenses and American-born voluntary patients. Volunteers had to cover their own transportation costs.<sup>998</sup> Addicts were defined by habitual use of opium, cocoa, marijuana, or peyote. By including marijuana, the Narcotic Farms signaled a national recognition of illicit drugs even broader than federal criminal law. Medical officials needed to approve the applications, which went to the Surgeon General. Surgeon General H.S. Cumming passed the regulations off to the District Judges, Narcotics Agents, U.S. Marshals, U.S. attorneys, and penal officials.<sup>999</sup>

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<sup>990</sup> Kola Gighball Company to Secretary of Commerce, 28 April 1934, Louis Ruppel, Acting Commissioner, to Kola Highball, Chicago Illinois, 11 May 1934, DEASF 63.

<sup>991</sup> Ruppel to John S. Owens, Lime Cola Company, 15 May 1934, DEASF Box 63.

<sup>992</sup> John S. Owens to J.F. Day, Bureau of Narcotics, 27 April 1934, DEASF Box 63.

<sup>993</sup> Owens responds, 25 May 1934, DEASF Box 63.

<sup>994</sup> Owens to Sir, 28 May 1934; Day to Commissioner, 12 June 1934—both in DEASF Box 63.

<sup>995</sup> Ruppel to Owns, 28 May 1934; Ruppel to Day, 11 June 1934—both in DEASF Box 63.

<sup>996</sup> Roosevelt to Thomson, 29 June 1933, OF 431: Narcotics; Morgenthau to President, 28 January 1937, OF21 Box 19: Narcotics; Assistant Surgeon General, Division of Mental Hygiene, to Isabelle S. Fosler, 4 June 1934, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940; Will Wood to LM Colle, 29 January 1935, RG 170 DEASF 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>997</sup> Proposed Draft of Letter from the President to be read at US Narcotic Farm at Fort Worth, 13 February 1937, OF21 Box 19.

<sup>998</sup> Regulations Governing the Admission of Persons to a United States Narcotic Farm, Effective April 1 1935, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>999</sup> Memorandum for United States District Judges, Nares, Marshas, Attorneys, Penal, 15 January 1935 Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

Narcotic farms had eclectic support. Letters flooded in from Americans wanting work at the federal facility.<sup>1000</sup> Since 1933, many Americans clamored for such a federal institution.<sup>1001</sup> The Acting Surgeon General saw the Narcotics Farm as a great opportunity.<sup>1002</sup> Robert Foulston thought narcotic farms were “one of the best things that the United States has done.”<sup>1003</sup> A Hearst newspaper wanted each state to have at least one.<sup>1004</sup> Louis Berg, a former Senior Medical Officer, saw drug raids as less effective than a care facility like his own “welfare Island.”<sup>1005</sup> There was a utopian aspiration at play. Millicent Gardner Morison thought the Farms would reveal that “drug traffic can and will be eradicated,” as she wrote optimistically to Morgenthau.<sup>1006</sup>

The Farms also drew confusion and detractors. The press labored to dispel the myth that the farm was a place to grow drugs. Hugh S. Cummings wanted a name change to avoid the connotation of “a farm on which we raise narcotics.”<sup>1007</sup> People also frequently wrote directly to the Narcotics Bureau, which did not control the Farms, asking about the treatment options and federal oversight.<sup>1008</sup> After reviewing a thousand cases, George V. Achilles called the farms an ineffective waste of money. He thought first-time offenders should endure five years of isolation at the Caroline Islands, and repeat offenders should get life sentences.<sup>1009</sup> At least one congressman supported the idea.<sup>1010</sup>

The Narcotics Farm process was somewhat flexible but ultimately very bureaucratic. The Farms did sometimes consider people in greater need.<sup>1011</sup> Treadway conceded that the process allowed personal direct appeals.<sup>1012</sup> But a mess of paperwork served as the gateway for entry. Routinized forms asked for details on usage, economic status, efforts toward cure, and reasons

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<sup>1000</sup> Gilbert Johnson to Smith, 3 December 1934, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1001</sup> Michael E Rafecz and ME Rafecz to Commissioner, 23 September 1933, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1002</sup> John McMullen, Acting Surgeon General, 25 April 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940; US Attorneys and US Probation Officers, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1003</sup> JLMcCormick to Will S Wood, 23 December 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1004</sup> *Washington Herald*, 28 August 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1005</sup> *Washington Herald*, 15 December 1934, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1006</sup> Millicent Gardner Morison to Henry Morgenthau, 9 December 1934, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1007</sup> Anslinger to Treadway, 17 January 1934, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1008</sup> L.P. Jensen to US Narcotic Bureau, 31 August 1933, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1009</sup> Geo. V. Achilles to Sterling P. Strong, Congressman, 12 January 1934, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1010</sup> Congressman to Anslinger, 15 January 1934, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1011</sup> H Martin to WC Brice, 26 April 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1012</sup> Treadway to Anslinger, 7 June 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

for failure.<sup>1013</sup> The forms went through several revisions.<sup>1014</sup> A prosecutor's "Certificate of Drug Addiction in a Convicted Person" included vital statistics, urban or rural living status, citizenship, residence, nationality, birthplace, and parents' citizenship.<sup>1015</sup> The paperwork was revised after 1935. A new form 9506 accommodated even more information.<sup>1016</sup> The U.S. Attorney's Office pushed for more data collection, thirsting for information on the number of living children, deceased children, employment for the last 10 years, and reasons for failed treatment.<sup>1017</sup> The forms were heavily guarded, and Anslinger had to ask for a restricted supply.<sup>1018</sup>

Anslinger acknowledged that the Narcotics Farms' combination of rehabilitation and incarceration demonstrated a New Deal war on drugs outside of his purview, and ensured his Bureau was careful about jurisdiction. He did not want to overstep his Bureau's authority, but he did help in the push to enlist more voluntary admits.<sup>1019</sup> When Anslinger asked for 300 copies of the regulations, Treadway replied that he would mail them directly to the Bureau officers.<sup>1020</sup> Questions from the Ohio Unemployment League were deferred to the Public Health Service.<sup>1021</sup> Anslinger repeatedly informed members of the public that the Narcotics Farms were under the Public Health Service's jurisdiction.<sup>1022</sup> Sometimes narcotic agents accidentally sent patients to the Narcotic Farm.<sup>1023</sup> Middlebrooks circulated a reminder that the rules mandated deference to the Public Health Service.<sup>1024</sup>

While demonstrating cautious deference toward the Farms, Anslinger was open to the possible pitfalls.<sup>1025</sup> Concerns about violations within the Farms drove undercover operations.<sup>1026</sup>

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<sup>1013</sup> H.H. McMike to Harry D. Smith, 14 May 1935, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1014</sup> Smith to Anslinger, 22 May 1935, Box 40: Addiction: Narcotics Farms General, 1933 through 1940; Wood to Treadway, 1 June 1935, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1015</sup> Prosecuting Officer's Certificate of Drug Addiction in a Convicted Person, Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1016</sup> James J. Biggins to Commissioner, 16 October 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1017</sup> Oyler to Commissioner, 1 August 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1018</sup> Anslinger to Cumming, 3 December 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1019</sup> Edmund to Anslinger, 16 February 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1020</sup> Anslinger to Treadway 4 February 1935, Treadway to Anslinger, 6 February 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1021</sup> Will S. Wood to Bauhof, Ohio Unemployment League, 13 April 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1022</sup> Anslinger to Jacobson, 11 October 1933; Anslinger to Johnson, 17 December 1934; Anslinger to Hassell, 7 March 1939—all in RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1023</sup> Wood to Treadway, 13 June 1935. Middlebrooks to JB Greeson, 24 June 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1024</sup> Middlebrooks to ALL Narcotic Officers, District No 5, 26 Nov 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1025</sup> Anslinger to Strong, 17 January 1934, Anslinger to Treadway, 17 January 1934, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1026</sup> Anslinger to Oyler, 5 September 1934, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

A request for a hundred new patients produced few results.<sup>1027</sup> Sometimes only one or two volunteers out of several possible candidates actually enrolled.<sup>1028</sup> Anslinger told Treadway that each district was now looking for eight volunteers each.<sup>1029</sup> As of September 1935 they only had one volunteer from Alabama and one from Louisiana.<sup>1030</sup> Another problem in Depression-era America was that potential patients had trouble paying.<sup>1031</sup> Poor offenders sometimes opted for jail rather than pay the Narcotics Farm fee.<sup>1032</sup> Others had apprehensions when they learned about the program. One man feared entering an inalienable contract and being inoculated with hyoscine. This fearful man otherwise qualified as a model candidate, according to Courtney J Coleman.<sup>1033</sup> Having tried to enlist voluntary inmates, the Narcotics Bureau continued receiving direct inquiries and forwarding them to the proper channels.<sup>1034</sup>

Although more distinctively rehabilitative in their approach, the Narcotics Farms champions were not necessarily less repressive than Anslinger. While respecting the Narcotics Farms' boundaries, he resisted the temptation to exploit the promise of rehabilitation for his own goals of enforcement. Anslinger sternly told an inferior to halt "inducement to service in the enforcement of the narcotic laws." He then circulated a memo prohibiting the practice of imposing conditions, such as assistance in pursuing violators, on offering treatment.<sup>1035</sup> Sometimes the progressive vision developed into a rather repressive one. New York Governor Herbert Lehman thought it would be good to have a "farm colony or work camp."<sup>1036</sup> Partlow thought that each state should have its own colony that committed addicts through compulsion and forced them to work. Addiction was often a "symptom of personality defects, constitutionally psychopathic trends," thus warranting sterilization.<sup>1037</sup> At the same time, At least in some ways the Narcotics Farms embodied a path both more progressive and less forgiving than Anslinger's own drug war vision.

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<sup>1027</sup> Frank Igoe to Anslinger, 16 September 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1028</sup> Igoe to Anslinger, October 28 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940; Duffy to A.M. Bangs, 11 September 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1029</sup> Anslinger to Treadway, 19 September 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1030</sup> Greeson to Anslinger, District 6, 17 September 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1031</sup> Oyler to Commissioner, 17 September 1935; Anslinger to Treadway, 20 September 1935—both in DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1032</sup> A.M. Bangs to Commissioner of Narcotics, 18 September 1935, DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1033</sup> Courtney J Coleman, Narcotic Agent, to William E. Clark, 10 October 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1034</sup> Ed L Mayers to Division of Narcotics 12 November 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1035</sup> Robert E. Meeds to B.M. Martin, 14 December 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940; Anslinger to Treadway, 26 December 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940; Memorandum to all Officers, 30 December 1935, RG 170 DEASF Box 40: Addiction: Narcotics Farms General, 1933 through 1940.

<sup>1036</sup> "Governor Lehman on Crime," *New York Times*, 9 January 1936.

<sup>1037</sup> Wilkinson to Greeson, Supervisor, New Orleans, 14 December 1934, RG 170 DEASF BOX 95: Uniform Narcotics Laws, Alabama.



While ambivalent about some Treasury Department drug policies, Anslinger embraced its fiscal priorities. In the 1930s the Narcotics Bureau became a proud collaborator in federal revenue collection. Tax evasion charges presented a means of pursuing drug offenders.<sup>1038</sup> Most early opportunities for collaboration targeted Harrison Law violators with black-market wealth beyond their claimed income to the IRS. Upon taking charge of the Narcotics Bureau, Anslinger wrote to the Commissioner of Internal Revenue about such suspects.<sup>1039</sup> The Commissioner David Burnet in 1931 forwarded such complaints. Anslinger continued in 1932, giving a list of those “unquestionably” in possession of property “undoubtedly far in excess of the amounts which they reported.”<sup>1040</sup> His interest in tax revenue predated Roosevelt’s tenure as president.

The many facets of Treasury Department drug control came together with taxation. Anslinger’s underlings informed him of possible income tax violations and lists of extravagantly living narcotics violators.<sup>1041</sup> Letters circulated requesting lists of all high-profit illegal jobs that might yield tax revenue.<sup>1042</sup> District supervisors got involved, furnishing lists of possible targets, ranging from short to rather long.<sup>1043</sup> The Seattle Director even underestimated how many they reported.<sup>1044</sup> Some lists named suspects specifically.<sup>1045</sup> Large dealers were targeted.<sup>1046</sup> Sufficiently minor dealers did not have the income large enough to trigger a tax.<sup>1047</sup> Sometimes revenue collection intersected with enforcing the law against gambling and alcohol.<sup>1048</sup>

The Narcotics Bureau’s tax activities became so frequent, integrating officials from top to bottom, that the process became routinized. In March 1936, Anslinger formalized the process with Circular 384, alerting that his officials report “every” narcotic violator “known or believed to have a large or unusual income” to the revenue bureau’s local Special Agent in Charge.<sup>1049</sup> Anslinger reiterated his orders on the phone.<sup>1050</sup> The directive bore fruit. New York City responded to the 1936 circular with a very long list of suspects.<sup>1051</sup> People with too many improvements on their house now became subjects of federal drug investigations.<sup>1052</sup> The

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<sup>1038</sup> *Washington Herald*, 28 April 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1039</sup> DEASF Box 168: “Income Tax Violators.”

<sup>1040</sup> Anslinger to Commissioner of Internal Revenue, 20 October 1932, RG 170 DEASF Box 168: “Income Tax Violators.”

<sup>1041</sup> Baldrige to Commissioner of Narcotics, 17 May 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1042</sup> Louis Ruppel, Deputy Commissioner, to HD Smith, 14 July 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1043</sup> RH Oyler, Chicago, 14 July 1933; G.W. Cunningham, 14 July 1933, Nashville, TN. Middlebrooks, Washington DC; LJ Ulmar, RG 170 DEASF Box 168: “Income Tax Violators”; Manning to Commissioner of Narcotics, 17 July 1933, RG 170 DEASF Box 168: “Income Tax Violators”; HS Forrer (Seattle) to Commissioner of Narcs 19 July 1933, RG 170 DEASF Box 168: “Income Tax Violators”; Greeson to Ruppel, 21 July 1933 — District No 6, RG 170 DEASF Box 168: “Income Tax Violators”; Ralph H. Oyler to Loius Ruppel, 18 July 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1044</sup> H.S. Forrer to Commissioner, 19 July 1933, DEASF Box 168: “Income Tax Violators”; Middlebrooks to Ruppel, 20 July 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1045</sup> C.O. Bradshaw to Anslinger, 20 July 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1046</sup> Joerling to Ruppel, 11 September 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1047</sup> Wall to Commissioner of Narcotics, 19 July 1933, DEASF Box 168: “Income Tax Violators.”

<sup>1048</sup> Memorandum for Mr. Irely, 18 September 1936, DEASF Box 168: “Income Tax Violators”; Ralph H Oyler to AC Grunewald, 18 December 1938, DEASF Box 168: “Income Tax Violators.”

<sup>1049</sup> Anslinger to District Supervisors, Circular Letter No 384, March 27 1936, DEASF Box 168: “Income Tax Violators.”

<sup>1050</sup> Anslinger to Elmerly Irely, 28 1936, DEASF Box 168: “Income Tax Violators.”

<sup>1051</sup> Memorandum for Assistant Secretary Gibbons, 24 November 1936, DEASF Box 168: “Income Tax Violators.”

<sup>1052</sup> J. B Greeson to Charles O’B Berry, 24 March 1939, DEASF Box 168: “Income Tax Violators.”

process of scrutiny through taxation reached from top to bottom. Sometimes the tips would come from as pedestrian a source as a druggist.<sup>1053</sup> Sometimes political corruption information went to the FBI.<sup>1054</sup> By 1937 the Bureau of Internal Revenue and the Treasury itself wanted direct access to the Narcotics Bureau's reports.<sup>1055</sup>

Having used tax law to regulate narcotics, the Bureau now used narcotics investigations to collect revenue. The Baltimore District Supervisor Martin noted "substantial amounts."<sup>1056</sup> Yet as a seasoned arm of revenue enforcement, the Narcotics Bureau circulated news of even the paltriest of triumphs. Anslinger found it worthy to personally praise the collection of \$4,000 here and \$2,800 there.<sup>1057</sup> In May 1938 the Bureau boasted the collection of \$16,000.<sup>1058</sup> Despite such small amounts, the Bureau found the undertaking worthy. By August, one Narcotics official was devoted exclusively to tax violations.<sup>1059</sup>

Unsurprisingly, the racial disparities of Narcotics Bureau enforcement extended beyond prohibition to the realm of tax collection. Immigrants, and especially deportees, found themselves ensnared by the tax police.<sup>1060</sup> Chinese nationals, in particular, became suspect.<sup>1061</sup> In pursuing this group, collectors entertained a low threshold for enforcement. Even relatively small amounts of under \$500 could implicate an entire Chinese-owned bank.<sup>1062</sup> Sometimes early reports exaggerated the significance of a catch. Yee Long found himself arrested in violation of the Harrison law and the Narcotic Drugs Import & Export Act.<sup>1063</sup> It turned out the amount reported was amplified by a factor of ten.<sup>1064</sup> The goal of revenue extraction proved flexible in implementation, as collectors took payment in Chinese currency and jewelry.<sup>1065</sup>

Narcotics officials recognized some limits. They rejected a proposal to pressure addicts with tax threats to get to the main dealers, because addicts probably would not know the main dealers.<sup>1066</sup> Federal narcotics officials also had to decide whether their closer allies were state law enforcement, or the federal fiscal apparatus. Using local tax laws was discouraged in the war on drugs. Garland Williams asked if they should work with New York State Income Tax Bureau

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<sup>1053</sup> Greeson to Charles O' Berry Special Agent in Charge, Intel Unit, Kansas City, 20 November 1939, DEASF Box 168: "Income Tax Violators."

<sup>1054</sup> Anslinger to Mr. W. Colf, 4 December 1939, DEASF Box 168: "Income Tax Violators."

<sup>1055</sup> To District Supervisors and Others Concerned, Circ Letter No 384, Supplement No 1, 1 March 1937 Irey to Anslinger 23 October 1937, DEASF Box 168: "Income Tax Violators."

<sup>1056</sup> Anslinger to Irey, 5 March 1938, DEASF Box 168: "Income Tax Violators."

<sup>1057</sup> Memorandum to all District Supervisors, 18 April 1938 from Anslinger, DEASF Box 168: "Income Tax Violators"; Memorandum for all District Supervisors, 16 May 1938, DEASF Box 168: "Income Tax Violators."

<sup>1058</sup> Memo to all District Supervisors, 23 May 1938: In re: Circular Letter 384, DEASF Box 168: "Income Tax Violators."

<sup>1059</sup> Memo for the Commissioner, 1 August 1938, ML Harney, DEASF Box 168: "Income Tax Violators."

<sup>1060</sup> Abstract of telephone call from Mr Garland Williams, NY to Commissioner Anslinger, 15 September 1938

<sup>1061</sup> Garland Williams to IR Intelligence Unit, NY, 11 March 1937, DEASF Box 168: "Income Tax Violators."

<sup>1062</sup> Anslinger, Memorandum for all District Supervisors, 12 August 1938, RG 170 DEASF Box 168: "Income Tax Violators."

<sup>1063</sup> LJ Ulmer, Acting District Supervisor, to Special Agent in Charge, Special Intel Unit, Bureau of Internal Revenue, 17 August 1938. Grunewald to Ralph H Oyler, District Supervisor, In re: Yee Long, 16 November 1938, DEASF Box 168: "Income Tax Violators."

<sup>1064</sup> Grunewald to Ralph H Oyler, District Supervisor, In re: Yee Long, 16, 16 November 1938, 16 November 1938, DEASF Box 168: "Income Tax Violators."

<sup>1065</sup> Will Wood, Memo for all District Supervisors, 20 August 1938, DEASF Box 168: "Income Tax Violators."

<sup>1066</sup> Palmer to Chief Intel Unit, 15 December 1936, DEASF Box 168: "Income Tax Violators."

to put the “heat” on them, to secure warrants from arrest.<sup>1067</sup> An official cautioned that it was “inadvisable from a tax-collection standpoint” to “harass. . . as much as possible,” because New York might get the money first. In the past governors from New York and California had not in wanted to cooperate with the federal Deputy Commissioner on such efforts.<sup>1068</sup> By the late 1930s, the Narcotics Bureau had tasted the awesomeness and divisiveness of the tax power.

Tax collection, along with the narcotics farms and cola regulation, revealed that New Deal efforts to control substances went far beyond Anslinger, who sometimes cooperated with these endeavors with deference to the limits of his authority. Such collaboration simultaneously brought him closer into the bureaucracy of the New Deal state while demonstrating that the Roosevelt administration hardly needed Anslinger’s activist agitation to pursue its own interests in drug control. The Treasury Department thought by many as a potentially moderating institution in checking the Narcotics Bureau, had its own goals in drug-control state building. The New Dealers valued Anslinger for his participation in this state-building, and in the late 1930s their interests would once again converge.

### Making a Federal Case out of Marijuana

By 1936 the Treasury Department fully backed the war on narcotics. Treasury Secretary Henry Morgenthau praised the war, applauding the president’s executive order targeting the narcotics trade.<sup>1069</sup> He reportedly saw drug enforcement as having “greater importance than. . . any other laws” under his jurisdiction.<sup>1070</sup> The mutual goal of a drug-free America united Anslinger and Morgenthau and transcended many disagreements.

But once again, the future of Anslinger’s Bureau turned on the resolution of such disagreements. One of the conflicts centered on another reorganization scheme. Liberal lion Robert L. Doughton aimed to destroy the Bureau. As Chairman of the House Ways and Means Committee, Doughton wielded great influence. He shepherded Social Security, the Crown Jewel of Roosevelt’s agenda, into law. Now he sponsored HR 10586, a plan to bring the Bureau of Narcotics along with the Division of Alcohol Tax Unit, the Internal Revenue Bureau, and Customs enforcement into the fold of the Secret Service.<sup>1071</sup> This would effectively abolish the Narcotics Bureau.<sup>1072</sup> Morgenthau supported Doughton’s HR 10586, and Anslinger again had to defend his institutional independence.<sup>1073</sup> As some New Dealers once again hoped to oust Anslinger, once again his value to the Roosevelt administration’s war on drugs saved him. As before, the invocation of international obligations would stave off reorganization. But this time, Anslinger’s camp turned to the menace de jour, a cause that ultimately united him and Doughton in the great culmination of New Deal drug policy—the war on marijuana.

For the usual reasons the usual suspects lined up behind Anslinger. The same argument arose: reorganization would violate the Geneva agreement of 1931, mandating an independent

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<sup>1067</sup> Garland Williams to Anslinger, 10 March 1939, Ireys to Anslinger, 14 March 1939, DEA Box 168.

<sup>1068</sup> Ireys to Anslinger, 14 March 1939, DEASF Box 168: “Income Tax Violators.”

<sup>1069</sup> Morgenthau to President, 8 November 1934, OF 431: Narcotics.

<sup>1070</sup> Hobson to Anslinger, 11 December 1936, HAP Box 3, File 4.

<sup>1071</sup> Memorandum in Respect to HR 10586, 1 February 1936, HAP Box 3, File 4; M. H. McIntyre, Assistant Sec to the President, to Mr. Johnson, 24 February 1936, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1072</sup> Mallinckrodt Chemical works to Anslinger, 30 January 1936, HAP Box 3, File 4.

<sup>1073</sup> Lexy Ford to Anslinger, 9 February 1936, Anslinger Papers, Box 3, File 4.

narcotics agency. The breach would embarrass America before the League of Nations. Indeed, Treasury Secretary Chief counsel Herman Oliphant agreed that the reform would undercut the treaty obligation.<sup>1074</sup> Others argued that the reform would also undermine government relations with the medical profession, pharmaceutical industry, pharmacists, veterinarians, and manufacturers. The American Pharmaceutical Association opposed the reform.<sup>1075</sup> Rowland Jones from the Washington Association of Retail Druggists called the bill a “potential danger to the pharmacists.”<sup>1076</sup> The National Woman’s Christian Temperance Union and Federation of Women’s Clubs opposed it.<sup>1077</sup> Anslinger could point to wide support in American civic society. One proposed amendment would have removed his Bureau from the Doughton Bill.<sup>1078</sup>

Of course, Anslinger’s friends at the World Narcotic Defense Association railed against the Secret Service plan.<sup>1079</sup> Hobson opposed “submerging the independent Bureau of Narcotics.”<sup>1080</sup> A letter to his organization’s Board of Directors cautioned that the bill would undermine the “structure thus far erected for international control” of narcotics and humiliate the United States.<sup>1081</sup> Hobson warned Roosevelt that it would “do violence to the cause of humanity against its deadliest enemy” and “strike down the historical leadership of America that has constituted the very soul of humanity’s warfare against this enemy.”<sup>1082</sup> Hobson also feared the “grip of cross-currents and counter-currents of mass psychology.” He urged the National Congress of Parents and Teachers to oppose the bill.<sup>1083</sup> He told Ida B. Wise Smith, of the National President of Women’s Christian Temperance Union, that the reorganization would endanger “our war for the defense of humanity.”<sup>1084</sup> Hobson also appealed directly to Doughton. He argued that HR 10586 would violate not only the Geneva Convention of 1931 but also the Hague Conventions of 1912 and 1913. It would undercut the very international “structure” America had done so much to build. It would thwart efforts at passing the Uniform Narcotics Law at home. Hobson pleaded Doughton for a chance to rise in opposition.<sup>1085</sup> Hobson shared this and other sensitive correspondence with Anslinger.<sup>1086</sup> In March Hobson asked Roosevelt for help defeating the reorganization.<sup>1087</sup> He was pulling out all the stops.

Continuing to cite familiar arguments about its autonomy, regulatory duties, and treaty obligations, the Narcotics Bureau came upon a new specific rationale in 1936—marijuana. “Only recently the great increase in the use of the dangerous drug, marijuana, has attracted wide

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<sup>1074</sup> Hon. Herman Oliphant to McIntire, 7 February 1936, OF 431: Narcotics.

<sup>1075</sup> E.F. Kelly to Anslinger 24, September 1936, HAP Box 3, File 4.

<sup>1076</sup> Rowland Jones (Washington Association of Retail Druggists) to Sir, 27 February 1936, HAP Box 3, File 4 Correspondence (1936).

<sup>1077</sup> Hobson to President, 4 March 1936, OF431.

<sup>1078</sup> Proposed Amendment to the Doughton Bill, Anslinger Papers, Box 3, File 4.

<sup>1079</sup> Resolution of the Board of Directors of the World Narcotic Defense Association against making Bureau of Narcotics a Division of the Secret Service, HAP Box 3, File 4.

<sup>1080</sup> Hobson to President, 4 March 1936, OF431.

<sup>1081</sup> Copy of Letter to all Members of the Board of Directors of the World Narcotic Defense Association, Inc., 3 February 1936, HAP Box 3, File 4.

<sup>1082</sup> Hobson to President, 4 March 1936, OF431.

<sup>1083</sup> Hobson to Langworthy, National Congress of Parents and Teachers, 13 February 1936, HAP Box 3, File 4.

<sup>1084</sup> Hobson to Ida B. Wise Smith, National President of Women’s Christian Temperance Union, 20 March 1936, HAP Box 3, File 4.

<sup>1085</sup> Hobson to Robert L. Doughton, 3 February 1936 HAP Box 3, File 4.

<sup>1086</sup> Hobson to Anslinger, 3 February 1936, HAP Box 3, File 4.

<sup>1087</sup> Hobson to President, 4 March 1936, HAP Box 3, File 4.

attention,” a February circular intoned. More than ever, America needed the Bureau to “plan for its regulation. . . and at the same time. . . protect legitimate business interests.”<sup>1088</sup> Later that month publisher Charles E. Tuttle also singled out “marijuana cigarettes” as “especially menacing and destructive to our youth.” The federal government, despite its limited power, could work with states to combat marijuana, but the Doughton Bill threatened such efforts. Tuttle branded narcotics as a “health problem,” a “social problem,” an “economic problem,” a “psychological problem,” a “medical problem,” a “legislative problem,” an “educational problem,” a “police and law enforcement problem,” an “agricultural problem,” a “scientific problem” and a “cooperative problem.”<sup>1089</sup> For Tuttle, concerns about drugs only invited the holistic, multi-pronged criminology of the New Deal. And indeed, the Narcotics Farm in Kentucky had already treated marijuana as a federal issue.

In April a major gathering at the Mayflower Hotel in Washington, DC, brought international credibility to Anslinger’s general approach of centralization, uniformity, and a multi-pronged attack on drugs, as well as to the specific problem of marijuana.<sup>1090</sup> This celebration of the anniversary of the Geneva Narcotics Limitation Convention ratification included delegates from the Irish Free State, the Minister of Eugoslavia, the Italian Embassy, and Lithuania. On the drug front, the international dimension to the war on crime coalition transcended major political divides. The cause united totalitarians and liberals. Nazi Germany’s Ambassador Herr Hans Luther touted his nation’s ratification of the Opium Conventions and its recent creation of “an official control office. . . to concentrate all endeavors to enforce the law against the abuse of narcotic drugs.”<sup>1091</sup> On behalf of the United States, J. Edgar Hoover was represented. Pro-labor Democrat Robert Wagner “most heartily” wished “every success” to the World Narcotic Defense Association. The Executive Secretary of the National Education Association affirmed his group’s devotion to this cause of “democratic civilization.” Speaker Burnes stressed that “treaties” and “international cooperation” were “absolutely necessary, but “national legislation and regulations” were also needed.” He noted that the “dual system of government” caused complications and noted that “we wish” for “domestic police power” to “continue to so reside, under the control of the individual states.”<sup>1092</sup> Liberal internationalism meant coordination with all levels of government, all across the world, to fight narcotics.

The hot new item on the agenda was the “menace of marijuana cigarettes.” American Federation of Labor President William Green favorably quoted Cummings’s “congratulations and good wishes of organized labor” and stressed the nefarious plotting of dealers to “hook even our school children with their destructive Marijuana cigarettes, with heroin and other powerful drugs.” He confidently announced that “organized labor can be enlisted 100% in the fight against dope” and would give the World Narcotic Defense Association “fullest cooperation.” On behalf of Anslinger, Mrs. Hamilton Wright urged that “wholehearted cooperation” was needed, that the

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<sup>1088</sup> Memorandum in Respect to HR 10586, 1 February 1936, HAP Box 3, File 4.

<sup>1089</sup> Address of Charles H. Tuttle, “The Menace of Narcotic Drugs,” Chairman of Exec Committee. New York City, 27 February 1936, HAP Box 3, File 4.

<sup>1090</sup> In *The American Disease*, Musto in fact sees the United States’s interest in the conference as motivated by “the possibility of securing a convention that would mandate domestic control of marihuana and opium-poppy cultivation” (216).

<sup>1091</sup> Report of Celebration of the Third Anniversary of the Ratification of the Geneva Narcotics Limitation Convention of 1931, Mayflower Hotel, Washington DC on April 1936, OF431.

<sup>1092</sup> Report of Celebration of the Third Anniversary of the Ratification of the Geneva Narcotics Limitation Convention of 1931, Mayflower Hotel, Washington DC on April 1936, OF431.

problem was never “wholly national.” She praised the twenty-nine states that had passed the Uniform Act, and urged that “all states and communities should act IMMEDIATELY” to arrest the spread of Marijuana.<sup>1093</sup>

The evangelism against marijuana was in full swing. A talk at the National Police Academy meeting in September highlighted cannabis.<sup>1094</sup> The drug warriors worried about every loose end. Marijuana prohibition had to go after leaves and foliage.<sup>1095</sup> Nationalism and populism reinforced the fear. Officials fretted about marijuana in Mexico.<sup>1096</sup> The grassroots panic was also palpable. One woman worried about the “invasion of Marijuana in our own Milwaukee High Schools” and about rumors that big companies would soon market the drug, but had trouble believing “that reputable tobacco companies would do this.”<sup>1097</sup> An article by Anslinger prompted Elmina Farquaher Cook to conclude “our civilization is crumbling.”<sup>1098</sup> Marijuana abuse seemed so ubiquitous as to threaten military integrity. Sailors in the Navy were using it.<sup>1099</sup> Soldiers on the coast smoked too.<sup>1100</sup> In Hawaii, military police caught troops with it.<sup>1101</sup> The security of America was at stake.

By 1936, most states had banned marijuana but legal ambiguity remained. Herman Jernigan had written that down “in the South” the weed grew and was “distributed from coast to coast.” He wanted to “enlist my services in stamping it down” but did not know its legal status.<sup>1102</sup> Later, despite any legal dangers, he ended up cultivating it, dealing it, and singing a different tune: “Indian Cannabis for the first time has HIT THE CEILING and is slated to REMAIN THERE, no act of man or god can displace it . . . Here’s the chance to try out its consistency, here’s a chance to understand its particular merit, here’s the chance to feel its sublime influence, like courting the stars of heavens, like living in some Garden of Paradise, in your every act, in your every gesture, in your every incorporated feature, in your minute by minute appraisal of coordinating acquiescences -- yes, sir, and for \$5.00 - - - . . . I have some pretty weed; its strong as toxin. . . here’s hoping you say: ‘Boy send me TWENTY POUNDS OF THE WEED. . . ’”<sup>1103</sup>

Part of the prohibitionist pitch centered on the substance’s presence in criminal activity. *American Magazine*’s famous issue, “Marijuana: Assassin of Youth,” underscored this. In a hearing Anslinger responded to Senator Davis’s question about the necessary quantity of cannabis to provoke violence by answering that sometimes “one cigarette” could give the user a “homicidal mania, probably to kill his brother.”<sup>1104</sup> Officials blamed marijuana for vicious crimes including child rape.<sup>1105</sup> One mother shared with Eleanor Roosevelt the story of her son

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<sup>1093</sup> Report of Celebration of the Third Anniversary of the Ratification of the Geneva Narcotics Limitation Convention of 1931, Mayflower Hotel, Washington DC on April 1936, OF431.

<sup>1094</sup> Letter to Gaston and Anslinger, 18 August 1936, HAP Box 3, File 4.

<sup>1095</sup> Anslinger to Lowell Mellett, 29 February 1940, RG 170 DEASF BOX 95: Uniform Narcotics Laws, Alabama.

<sup>1096</sup> William to Anslinger, 9 May 1938, HAP Box 3, File 2.

<sup>1097</sup> Ann Grover, 13 July 1937 to HAP Box 3, File 3.

<sup>1098</sup> Elmina Farquaher Cook to Anslinger, 28 July 1937, HAP Box 3, File 3.

<sup>1099</sup> Jack Golden, FNR, US Naval Home, to Chief of Narcotics, 30 June 1937, HAP Box 3, File 3.

<sup>1100</sup> Grant Adams, Jr, Dear Sir, 14 April 1938, HAP Box 3, File 2.

<sup>1101</sup> To Commissioner of Narcotics, 17 November 1936, form AM Bangs, HAP Box 3 File 3.

<sup>1102</sup> Herman S. Jernigan, 12 November 1933, HAP Box 3 File 4.

<sup>1103</sup> Jernigan to Oregon State Ag College, 1 March 1936, HAP Box 3, File 4.

<sup>1104</sup> Bonnie and Whitebread, *Marihuana Conviction*, 143 (quotation on 157).

<sup>1105</sup> James J. Biggins to Anslinger, 1 October 1937; DL Yutronich to BM Martin, 20 October 1937, HAP Box 3, File 3.

ruining his life with marijuana and winding up in a municipal farm.<sup>1106</sup> Reinforcing this panic, a slew of propaganda films warned of the marijuana menace.

But other officials drew different conclusions. Some psychiatrists on the record insisted that marijuana did not cloud moral judgment, so as to counter the criminal defense of incompetency.<sup>1107</sup> Some in the Narcotics Bureau also expressed skepticism of the debilitating power of marijuana. One official thought it was comparable to tobacco, coffee and tea.<sup>1108</sup> A doctor feared that physicians would be harassed under a strict law.<sup>1109</sup>

An institutional problem remained: constitutional federalism.<sup>1110</sup> Administration officials searched for the most plausible constitutional authority for a national ban. The Narcotics Bureau had in fact recommended against a pair of bills in the Senate and House in 1935 to prohibit the transportation of marijuana via interstate and foreign commerce.<sup>1111</sup> In early 1936 Anslinger met with Professor Chamberlain of Columbia University, as well as representatives from the State Department, the League of Nations, and the Foreign Policy Association, to discuss “every angle” the federal government might exploit. The interstate commerce clause seemed insufficient. They considered *Missouri v. Holland*, a 1920 Supreme Court case affirming the 1918 Migratory Bird Treaty Act against a Tenth Amendment challenge and figured that the smuggling angle could trigger federal authority under treaty obligations to Canada and Mexico. Any regulatory arrangement would need to accommodate the medical industry, which had a “small medical need for marijuana, but has agreed to eliminate it entirely.” Alternatives for vets and the Department of Commerce would help.<sup>1112</sup> In the twilight of 1936, the World Narcotic Defense Association planned its big push for the Uniform law, and for the cause against marijuana, updating its outreach pamphlet.<sup>1113</sup> Another idea involved regulating marijuana through taxation, which worked with the Harrison Narcotics Act, but one difficulty in this route was that drugs regulated by the 1914 law were exclusively imported, which was not the case with marijuana.

Finally, demonstrating the constitutional continuity in the New Deal’s various prohibitions, the drug war architects looked to the 1934 National Firearms Act as a legislative model.<sup>1114</sup> Congress still feared that direct regulation, without a justification rooted in taxation, might fail constitutional muster.<sup>1115</sup> Anslinger himself doubted the proposed legislation’s constitutionality.<sup>1116</sup> Once Congress held hearings on the matter, however, Anslinger stressed the interstate flow of marijuana trade.<sup>1117</sup>

Although treaty obligations were not the proximate constitutional justification, internationalism had sustained the Narcotics Bureau long enough for constitutional attitudes to shift. Marijuana’s

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<sup>1106</sup> Gertrude McCord to Mrs. Roosevelt, 25 January 1937, HAP Box 3, File 3 Correspondence (1937).

<sup>1107</sup> Dan Jackson, Criminal district Attorney to James J Biggins, 25 August 1937; Dewey Tom to JJ Biggins, 21 September 1937, HAP Box 3, File 3.

<sup>1108</sup> Bell to Wood, 7 October 1937, HAP Box 3, File 3 Correspondence (1937).

<sup>1109</sup> EL Camp to Greeson, received 1 July 1935, RG 170 DEASF BOX 95: Uniform Narcotics Laws, Alabama.

<sup>1110</sup> See “The War on Crime Constitution,” chapter 6 of this dissertation, for more discussion of federalism, including in reference to marijuana prohibition.

<sup>1111</sup> Bonnie and Whitebread, *The Marijuana Conviction*, 118–22.

<sup>1112</sup> Memorandum for Assistant Secretary Gibbons, 3 February 1936, HAP Box 3, File 4.

<sup>1113</sup> Hobson to Anslinger, 11 December 1936, HAP Box 3, File 4.

<sup>1114</sup> Bonnie and Whitebread, *The Marijuana Conviction*, 126. See also McWilliams, *The Protectors*, 69.

<sup>1115</sup> Bonnie and Whitebread, “The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition,” *Virginia Law Review* 56, No. 6, (Oct. 1970), 989.

<sup>1116</sup> David F. Musto, “The Marijuana Tax Act of 1937,” *Arch Gen Psychiatry* 26 (2), February 1972.

<sup>1117</sup> Bonnie and Whitebread, *Marihuana Conviction*, 163.

ascendance on the international drug war rationalized the Narcotics Bureau's continuing work, and prohibition now united Anslinger and the New Deal Democrats. The war against marijuana flavored the agenda.<sup>1118</sup> Doughton, an old Democrat, sought a law enforcement pragmatism in his approach, but Anslinger's way proved more congenial. Doughton introduced HR 6906, relaying the "unanimous" support of the committee. After 41 states had already banned marijuana, the Marijuana Tax Act passed with a unanimous voice vote. Doughton had started 1936 trying to rid of Anslinger's Narcotics Bureau, and ended 1937 by sponsoring the most consequential legislative guarantee of its institutional mission in American history—far beyond Anslinger's wildest desires.<sup>1119</sup>

As was the case with alcohol, marijuana prohibition brought together federal and state enforcement. Between October 1, when the Marijuana Tax Act went into effect, and the end of 1937, the federal government identified 250 violations, boasted 221 seizures, and touted 223 arrests. Federal and state officials confiscated 6,401 Marijuana cigarettes, 667 pounds of dried marijuana, 33.5 pounds of seeds, and 70,000 plants.<sup>1120</sup> In the first conviction under the act, Judge J. Foster Symes in Denver sentenced Sam Caldwell to four years in a penitentiary. He condemned marijuana as "the worst of all narcotics—far worse than the use of morphine or cocaine." It turned men into "beasts" and so the judge had "no sympathy" for its dealers. He looked forward to issuing "the heaviest penalties" and the enforcement of "this new law to the letter."<sup>1121</sup>

The federal scrutiny of even pettiest local details underscored the invasive reach of this unprecedented national power. As every level of government authority participated in the new war, the local narcotics bureau officers coordinating with police departments, Anslinger kept abreast of even street-level violations.<sup>1122</sup> He received all the specifics, including the race of violators.<sup>1123</sup> Even Morgenthau sometimes received detailed information.<sup>1124</sup> Deputy Clerk of Court notified the Commissioner that he used to be in a band in Peoria, Illinois, where people smoked pot.<sup>1125</sup> The feds learned of an orchestra leader and his nightclub entertainer wife accused of selling marijuana cigarettes.<sup>1126</sup> The intimate details sometimes conflicted with the dominant propaganda. Undercover agent John H. Orth lived among marijuana smokers over a prolonged period and reported fourteen subjects—individuals and groups of smokers. Despite the conspicuous racialization of his categories, he depicted most of the smokers as benign. He documented a "Puerto Rican woman, about 22 years of age" who became "very hungry" and ate "double the amount of the normal person" when smoking. He reported a young white man who thought he was a great publisher. He took notes on a Cuban who smoked and fell asleep in the closest automobile, which did not "annoy anyone except possibly the owner of the car." Orth described a 40-year-old Greek man who spoke quickly upon smoking and a "group of colored

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<sup>1118</sup> Dear Senator, 20 March 1936, HAP Box 3, File 4.

<sup>1119</sup> McWilliams, *The Protectors*, 75.

<sup>1120</sup> 13 March 1938, HAP Box 3, File 2.

<sup>1121</sup> Memorandum for the 1937 Report 12 October 1937 HAP Box 3, File 3.

<sup>1122</sup> Anslinger to McReynolds, 7 July 1938, HAP Box 3, File 2.

<sup>1123</sup> Oyler to Anslinger 1 October 1937, HAP Box 3, File 3.

<sup>1124</sup> Ward to Morgenthau, 30 November 1937, HAP Box 3, File 3.

<sup>1125</sup> Ralph M Oyler to Commissioner, Attn: Enforcement Division In re: Herbert Napka, 9 December 1938, HAP Box 3, File 2.

<sup>1126</sup> S.E. Wien to McGeever, 9 May 1938, HAP Box 3, File 2.



men” who smoked “several” joints each, then “appeared to be happy and laughing at the stories told” while playing pool, which did “not seriously annoy anyone else.”<sup>1127</sup> While in the long-term the federal war on marijuana scaled upward and became impersonal, in the years before World War II federal officials could take interest in subjects they knew posed no threat.

Officials, now tasked with suppressing marijuana, immediately raised doubts about the drug’s severity. Edward A. Murphy reported giddy and restless users, but found the withdrawal symptoms almost undetectable. He wondered if users describing problems were harmed more by alcohol than “marihuana alone.”<sup>1128</sup> Others doubted the anti-marijuana propaganda films, produced “to make lots of money” while exaggerating the effects.<sup>1129</sup> Sometimes enforcement caught the wrong people, like one Congressman’s friends with names similar to those of known traffickers.<sup>1130</sup> From its first moments the federal war on marijuana, having had less time to gestate than alcohol prohibition, suffered a distinct ideological ambivalence.

Despite his long-standing constitutional doubts, Anslinger resorted to legal positivism to assert marijuana’s danger once the feds banned it. In response to Michael Ball questioning the sensationalist descriptions, Anslinger simply noted that all 48 states agreed with him and Congress had made it illegal on October 1. Anslinger also pointed to James Munch of Temple University, and others, like F.C. Gomila, the Director of Public Safety, who found the drug dangerous. The League of Nations Committee of Experts agreed. It associated marijuana with “murder, brutal assault and other crimes of violence,” and Egyptian authorities reported an epidemic of marijuana cases in the hospitals.<sup>1131</sup> Having cited internationalism and marijuana to save the Narcotics Bureau, Anslinger now encouraged an amplified crackdown across the globe.

While scholars criticize Anslinger changing his mind—first opposing then supporting a federal marijuana ban—the New Deal state took up the crusade and never looked back.<sup>1132</sup> The Narcotics Farms counted marijuana as a legible federal issue before the 1937 law, which propelled a federal war on drugs more unrelenting than anything Anslinger previously devised. Far from being a conservative aberration in the New Deal era, Anslinger sometimes harbored sensibilities comparably liberal to those of the New Deal state in general. While the Narcotics Farms were more rehabilitative than Anslinger’s emphasis, they were also more repressive. While Anslinger was more outwardly racist, Roosevelt tolerated this racism while advancing drug policy. As a general rule, Roosevelt resisted giving pardons and clemency for drug offenses. He considered such crimes “the worst of all crimes except murder,” and perhaps even worse because beyond taking “the life of a fellow human being,” drugs destroy “the mind of the individual and make his future life intolerable for the good of his own soul.”<sup>1133</sup> Anslinger, in contrast, sometimes recommended pardons for drug offenders during the first decade of marijuana prohibition.<sup>1134</sup>

Sometimes the New Dealers went further than Anslinger in demonizing marijuana, even as they sometimes shared aspirations for a therapeutic approach. Lawrence Kolb, the Assistant

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<sup>1127</sup> Garland Williams, In re: Marihuana, 16 June 1938, HAP Box 3, File 2.

<sup>1128</sup> Edward A Murphy to Major Garland Williams, 20 May 1938, HAP Box 3, File 2.

<sup>1129</sup> CH Bowers to Dear Sir, Joseph Bell, In re—Carl Oliver Walcott 27 October 1937 HAP Box 3, File 3.

<sup>1130</sup> Memorandum, 7 September 1938, HAP Box 3, File 2.

<sup>1131</sup> Anslinger to Michael Ball, 18 October 1937, HAP Box 3, File 3.

<sup>1132</sup> Larry “Ratso” Sloman, *Reefer Madness: The History of Marijuana in America* (1st St. Martin's Griffin ed, 1998).

<sup>1133</sup> Memorandum for Jim Rowe, 4 October 1940, OF431: Narcotics, 1933–1943.

<sup>1134</sup> Presidential Memorandum for Commissioner H.J. Anslinger, 25 April 1942, OF21 Box 19.

Surgeon General, told the Chicago Academy of Criminology, addiction was “an evil that has been with us always.” He found opium the most fearful drug, but cocaine and marijuana as “more harmful than opium.” He conceded that many addicts lived “normal, useful lives” but held that most were “unstable neurotic or psychopathic people.” Kolb considered it a shame that thousands had gone to prison “where their real needs were neglected” and touted Lexington Farm for its one-third success rate among releases. But the real problem was that marijuana, although less addictive and prone toward dependence, was “more harmful when continually taken.” He considered it a mistake to give long sentences in over-emphasizing the connection with crime. He believed regular people who smoked marijuana were similar to drinkers.<sup>1135</sup> Anslinger agreed with Kolb that enforcement under the Harrison Act failed to account for some tragedies, people Kolb called “incurable” addicts. Anslinger thought punishment inappropriate in such cases, but Kolb believed distinguishing hopeless addicts from those “for whom repression in the way of strict regulation, along with scientific treatment, might do good,” would require an “extensive machinery.”<sup>1136</sup> The hope of rehabilitation through repression warranted the occasional and futile torment of a hopeless subject.

By 1939 and 1940, it was clear that the future of federal policing was in drugs, not liquor. Treasury enforcement of narcotics offenses yielded average sentences of around 700 days, about twice as long as alcohol offenses.<sup>1137</sup> Alcohol Tax Unit employees sometimes envied the job security of counterparts in the Narcotics Bureau, who enjoyed protection in the Civil Service. In March 1938 twenty-three of them in Chicago lobbied the president directly for permanent Civil Service Commission (CSC) status.<sup>1138</sup> The administration punted the question to the Civil Service Commission, as even the president could not make the change unilaterally.<sup>1139</sup> Along with the Treasury the CSC recommended against the change. The Alcohol Tax Unit agents had made their way into federal jobs through the Works Project Administration, and had never gone through the competitive procedure endured by those enjoying Civil Service protections.<sup>1140</sup> As late as April 1939, rumors of Treasury Department reorganization concerned Alcohol agents who wanted an opportunity to take the civil service examination.<sup>1141</sup> The Reorganization Plan No. III, ratified in April 1940, abolished the office of the Administration of Federal Alcohol Administration.<sup>1142</sup>

A national drug war would shape America’s destiny. Back in Alabama, after the state health official who rejected the Uniform Narcotics Law died in 1942, a federal narcotics official mused that more severe penalties were now on the table.<sup>1143</sup> So began the trend when the Deep South,

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<sup>1135</sup> Assistant Surgeon General Lawrence Kolb, “Medical and Social Effects of Drug Addiction,” Chicago Academy of Criminology, 10 February 1939, HAP Box 3 File 1.

<sup>1136</sup> Lawrence Kolb to Anslinger, 29 June 1939, HAP Box 3 File 1.

<sup>1137</sup> Mr. Haas to Secretary Morgenthau, Treasury Criminal Cases-Enforcement, November 1940, 31 December 1940, HMP Box 383, Criminal Statistics-1940.

<sup>1138</sup> Office of District Supervisor, Treasury Dept, Chicago, to President FDR, 18 March 1938, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1139</sup> **May**, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1140</sup> Bureau of the Budget to Mr. McIntyre, 23 May 1938, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1141</sup> Erven Palmer to Mrs. Roosevelt, 17 April 1939, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1142</sup> Secretary of Treasury to President, 27 June 1940, OF21 Box 20: Dept. of the Treasury—Alcohol Tax Unit, 1934–5.

<sup>1143</sup> Greeson to Anslinger, 3 January 1942, RG 170 DEASF BOX 95: Uniform Narcotics Laws, Alabama.

so resistant to federal encroachment in the past, became the most reliable partner in the federal government's unrelenting war on drugs. Unlike the upside-down federalism of the war on alcohol, the drug war would bind federal and state power together in sustainable harmony. At first institutional capacity limited this promise, but thanks to the expansion of prison capacity, spurred in part by the New Deal, the federal war on marijuana that began under Roosevelt intensified almost uninterrupted for the next eighty years.



It is misleading to study Anslinger's 1930s triumphs outside the context of the New Deal war on crime. Despite deep partisan divides, Anslinger saved his job and bureau by making himself useful to liberal governance. His internationalism, holistic approach to crime and addiction, corporate connections, nuanced appreciation of jurisdiction and the law, and even his humanitarian interests brought him in league with New Deal criminology. His indirect support of state-level criminalization efforts made his mission consistent with New Deal penology. The New Deal state's perfection of the Treasury's machinery—its cocaine regulation, narcotics farms, and weaponization of taxation—gave Anslinger opportunities to collaborate with fellow state-builders even as they enjoyed control over their separate drug control empires. Despite partisan differences and his vulgar racism, Anslinger's relationship to the rest of the war on crime coalition was mutual and deep.

In general terms, by the late 1930s, the contradictions between the conservative and progressive arms of drug policy were resolved, and a new liberal war on drugs emerged. The drug policy legacy of the New Deal reconciled coexisting multiple strains, made possible by the presence of both wets and dries and both progressives and conservatives. The hardline approach to drug policy did not arise from a sole reliance on repression, but also followed the logic of crime prevention. Incarcerating addicts in Narcotics Farms and imprisoning cannabis dealers arose out of liberal politics, out of international commitments, out of the drive to rehabilitate as much as to discipline. By the end of the 1930s, the Treasury had all the instruments of police power that reformers had feared and worked to prevent before the rise of alcohol prohibition. This time it did not take a constitutional amendment to arm the federal state. But federal marijuana prohibition did require a revolutionary shift in legal consciousness regarding federalism and the police power. Here, too, the war on crime and New Deal had converged to make it happen.

## Chapter 6

### *The War on Crime Constitution*

No less than Roosevelt's economic policies, the New Deal campaign against crime pushed the boundaries of legal and constitutional interpretation. The national prohibition of marijuana in 1937, without a constitutional amendment, marked a revolutionary shift toward a broad acceptance of federal police power.<sup>1144</sup> That same year this consensus became overshadowed by a more partisan and contentious matter of constitutional history. Historians, in reflecting on 1937 and constitutionalism, think little of marijuana prohibition and more likely recall President Roosevelt and Attorney General Cummings's controversial plan to pack the Supreme Court with additional liberal justices who would more reliably uphold New Deal legislation.<sup>1145</sup> Yet both the abortive attempt to pack the court and the new national drug policy illustrate the transformative relationship between New Deal liberalism and constitutionalism, and their bearing on national enforcement authority. The controversy over the judiciary signaled the enduring clash between constitutional liberalism and its conservative critics. But the neglected story of 1930s legal thought is the consensus over criminal justice power as a driver of policy imagination and creation.

The 1930s are hardly remembered as a decade of consensus on legal interpretation. The focus on social and economic legislation—issues of welfare, labor, and regulation—captivated the New Dealers and has ever since shaped understandings of the period's legal debates. Historians have tended to follow the New Dealers themselves in framing the 1937 showdown over the judiciary as part of a broader political struggle in which legal interpretation was but a battleground. The president insisted that shared principles guided both his courtpacking scheme and the judicial side of his war on crime. In August 1937 he expressed frustration that many Americans failed to understand this. While presenting a milder judicial reform package, Roosevelt suggested “a veritable conspiracy” among many leading legal professionals, whose exploitation of the “technicalities of the law” along with the “conservatism of the courts” had obstructed “social and economic reform.” He touted “great advances” in criminal procedure reform, and urged moving in “the same general direction” on economic regulation.<sup>1146</sup> Cummings also saw the problem as essentially political. The legal conservatism obstructing New Deal progress was a proxy for political conservatism. The Attorney General differentiated his adaptive legal philosophy to reactionary traditionalism, lamenting the “futile differences between those who take a liberal view and those who take what is called a conservative view of the law.”<sup>1147</sup> Robert Jackson, a future Attorney General and Supreme Court Justice appointed by Roosevelt, decried the American Bar Association's anachronistic “Old Deal” approach and the legal profession's conservative view of the “Constitution, not as a source of power to advance the general welfare, but only as a document

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<sup>1144</sup> See “Worse Than Murder,” chapter 5 of this dissertation, for more on marijuana prohibition.

<sup>1145</sup> Scholars have long debated the effect of Roosevelt's plan on Supreme Court voting. For a recent social science approach see Daniel E. Ho and Kevin M. Quinn, “Did a Switch in Time Save Nine?,” *Journal of Legal Analysis* 2, Issue 1 (Spring 2010): 69–113.

<sup>1146</sup> Memorandum Approving a Bill for Judicial Reform, 26 August 1937, in APPUCSB.

<sup>1147</sup> Homer S. Cummings, “Modernizing Federal Procedure,” *ABA Journal*, Vol. 24, No. 8 (August 1938), 626.

of limitation.”<sup>1148</sup> Historians focusing on liberalism and conservatism in 1930s legal thought have followed Cummings’s and Jackson’s emphasis and framing. Focused on the struggle to legitimate the welfare state, they have paid little attention to questions of crime and punishment.<sup>1149</sup>

The court-packing showdown and the political struggle underneath it dominated 1930s constitutional and legal debate, but they obscured something comparably important. As controversy over economic policy raged, crime policy drove some of the most significant developments in legal and constitutional interpretation and corresponding theories of political centralization. These exercises in legal interpretation did not conform to the more visible policy debate. The American Bar Association’s meetings and journal showcased some of the most prominent dissent against New Deal constitutionalism, but also devoted serious attention to the issue of crime starting in the early 1930s. In April 1934, as the administration worked to pass major crime legislation in Congress, Cummings told an ABA gathering that there was “no question confronting the American people. . . of more immediate and vital consequence” than the campaign against crime.<sup>1150</sup> On such questions, the ABA was a friendly audience.

Even in their seeming disagreements, constitutional liberals and conservatives advanced the police power at both the national and state levels through the logic of crime fighting. Some of their disagreements were on the substance of criminalization. New Deal liberals more than conservatives sought to criminalize behaviors—such as hiring child labor—for purposes of economic regulation. Other disagreements had more to do with rhetorical emphasis. Conservatives stressed the need for deference to tradition while acknowledging the need for expansive national power, while liberals reversed the emphasis, conceding the impropriety of full nationalization while urging the need for modernization. The dramatic changes in criminal justice policy throughout the 1930s—the weakening of traditional due process protections, the new cooperation between national and state authorities, the vast expansion of criminal law and policing at all levels of government—required that both New Deal liberals and their conservative critics formulate constitutional rationalizations distinct from the major strains of thinking under Prohibition. Ultimately, even seemingly oppositional stances converged in a new synthesis, as both constitutional liberalism and constitutional conservatism moved to embrace greater government power in the name of crime-fighting.

On the main controversy of jurisdiction and law and order since Reconstruction, the New Dealers developed a novel federalism with vast political implications, both for the legitimacy of the national government and for the most paradoxical combination in the New Deal coalition.

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<sup>1148</sup> In identifying the divide, Robert Jackson, a future Roosevelt Attorney General and appointee to the Supreme Court, believed that “The future progress of government lies in the direction of carrying law and order across the frontiers of anarchy. Jackson questioned the “economic value of our formulae of ‘due process of law’ or of ‘freedom of contract’ to the 12,000,000 American families whose average income in the prosperous year of 1929 was under \$1,500.00.” Robert J Jackson, “The Bar and the New Deal,” *ABA Journal* 21, No. 2 (February 1935).

<sup>1149</sup> In the third-century since Peter H. Irons, *The New Deal Lawyers* (Princeton: Princeton University Press, 1982), put legal practice at the center of the New Deal story, few scholars in this tradition have discussed criminal law more than peripherally. Daniel J. Hulsebosch focuses on economics in “The New Deal Court: Emergence of a New Reason,” *Columbia Law Review*, Vol. 90, No. 7 (Nov., 1990), 1973–2016. Bruce Ackerman’s canonical treatment of the revolution in America’s unwritten Constitution, thus speaking to high political culture, focuses on political economy with almost no mention of crime. Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998), 312–82. Many of the revisionist works, cited in the notes below, complicate the narrative but take as a given the same subject matter.

<sup>1150</sup> Cummings, “Immediate Problems for the Bar,” *ABA Journal* 20, No. 4 (April 1934), 2012.

The new war on crime federalism not only satisfied conservatives and liberals, locals and federal officials, but also provided hope to both Jim Crow Democrats and civil rights advocates. Crucial to the New Deal coalition was the maintenance of simultaneous and conflicting hopes—white Southerners hoped that the federal government would not interfere with local instruments of white supremacy, and African-Americans and racial liberals hoped that one day it would. The war on crime served as a central venue of this contradiction, as the New Dealers did nothing to stop lynching even as they gestured toward a more active national civil rights enforcement function. While in the long run the zero-sum game between federal and state power would once again emerge, pushing overt questions of civil rights, more generally the modern carceral state at all levels of government, and indeed New Deal state building itself, gained in their short- and long-term health thanks to the 1930s consensus. Taken together, the war on crime coalition relied on a convergence in legal theory that accommodated significant reforms in criminal procedure, served the construction of a new compromise in federalism, and by the late 1930s extended the boundaries of governmental power in ways as consequential as the constitutional clash and resolution over New Deal political economy.<sup>1151</sup>

### The Other Due Process

In the early 1930s, dissatisfaction with criminal procedure raised fundamental questions about state and national governance. In 1932 the Supreme Court significantly extended federal protection of defendants' rights in state courts. *Powell v. Alabama* overturned the conviction of the famous Scottsboro Boys, nine black teenagers accused of raping two white women, on the grounds that Alabama had deprived them of their right to an attorney. Justice Sutherland's majority opinion harked back to English common law and interpreted the Fourteenth Amendment as guaranteeing the right to counsel, effectively binding state proceedings by the language of the Sixth Amendment.<sup>1152</sup> Justice Butler's dissent criticized the Court for "an extension of federal authority into a field hitherto occupied exclusively by the several States," without justifiable precedent.<sup>1153</sup> Indeed, *Powell* would become one of the most important decisions for generations as the federal judiciary widened its scrutiny of state-level criminal procedure.<sup>1154</sup>

This landmark Supreme Court case defied the conventional partisanship of 1930s constitutionalism. The Court's conservatives split on *Powell*. Sutherland was joined by Justice van Devanter, whereas Butler's sole concurrence came from McReynolds. These "Four Horsemen" notoriously rejected the constitutionality of New Deal legislation and their obstinance inspired the 1937 court-packing scheme. The eventual triumph of economic regulation has been widely seen as the end of the so-called *Lochner* era, a period when activist conservatives in the judiciary interpreted the Fourteenth Amendment's "due process" clause to

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<sup>1151</sup> Norbert C. Brockman, "The History of the American Bar Association: A Bibliographic Essay," *The American Journal of Legal History* 6, No. 3 (Jul., 1962), 269–285.

<sup>1152</sup> *Powell v. Alabama*, 287 U. S. 60.

<sup>1153</sup> *Powell v. Alabama*, 287 U. S. 60, 76.

<sup>1154</sup> The extension of the Fourteenth Amendment's due process clause to other Bill of Rights protections reverberated in future cases. See, for example, Samuel Hendel, *Charles Evans Hughes and the Supreme Court* (New York: King's Crown Press, Columbia University, 1951), 96–97.

overrule economic regulation.<sup>1155</sup> Despite conflation of different issues—most of all the many interpretations of federalism, which could coherently defer to state-level social legislation while finding it unconstitutional at the federal level—the struggle over “substantive due process” prevails as a narrative trope in defining the New Deal clash in legal thought.<sup>1156</sup> Yet when it came to the original due process—the procedural safeguards enjoyed by criminal defendants—the fault lines did not always correspond to conventional domestic politics.

While conservative and liberal judges sometimes defied partisan expectations in criminal procedure cases, the loudest New Deal champions and critics, despite disagreement on economic “due process of law,” shared a remarkable deal of agreement on the other due process—the legal protections enjoyed by the accused.<sup>1157</sup> The failures of Prohibition highlighted the urgency for reform of some sort. The Wickersham Commission provided recommendations on double jeopardy statutes, interstate witness summoning, and use of force in arrests. After the 1931 commission, liberals and conservatives argued for reform in different terms, sometimes stressing different issues or different positions, but for the most part they converged. Roosevelt and

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<sup>1155</sup> In 1933 Robert E. Ireton recognized Powell also involved balancing questions of federalism with “due process,” in this case procedural, as was understood at the time. Robert E. Ireton noted that “The borderland of federal and state authority, owing to our dual system of sovereignty in nation and state, requires in one who would explore it a sense of delicacy and a faculty of keen discernment.” Robert E. Ireton, “Due Process in Criminal Trials,” 67 *United States Law Review* 83 (1933), 89.

<sup>1156</sup> The *Lochner* era began in 1905 when the Supreme Court interpreted the Fourteenth Amendment’s due process clause to include “freedom of contract” so as to overturn a New York labor regulation. In a very common narrative, the Court’s conservatives continued to stifle economic regulation until the court-packing scheme intimidated them into upholding New Deal legislation. For an overview of the endurance of this narrative and its many problems, see G. Edward White, *The Constitution and the New Deal* (Cambridge: Harvard University Press, 2000), which focuses on the flawed accounts of the 1930s. For an intellectual history that identifies this period as an aberration in legal thought see Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, D.C.: Beard Books, 2006 [1975]). For revisionist views on the *Lochner* era’s continuity with structural trends of legal interpretation see Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (New York and Oxford: Oxford University Press, 1998); Howard Gillman, *The Constitution Besieged: The Rise and Demise of *Lochner* Era Police Powers Jurisprudence* (Durham and London: Duke University Press, 1993); and Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford and New York: Oxford University Press, 1992). On the shaping of such narratives by the political allure of the Warren Court, see Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996). More generally speaking, popular and scholarly assessment of the clash over “substantive due process” has long conflated broad questions of constitutional interpretation. On the one hand was the question of federal authority over state policies. On the other hand was the question of whether economic regulation—at the state or federal level—violated substantive due process. In principle, one could have supported federal intervention against the states for reasons of both “substantive due process” and procedural courtroom protections, as Sutherland did. Or one could have opposed federal intervention to secure state defendants’ rights while scrutinizing economic regulation at either the federal or state level, as Butler did. One could have held any combination of opinions about the constitutionality of economic policy, the guarantees of criminal procedure, and the proper role of federal intervention, and not fit within the binary suggested in the story of the 1937 showdown over New Deal legislation finally ending the *Lochner* era. Of course the judges’ records were much more complicated than this. In 1923 Butler and Devanter joined McReynolds’s finding in *Meyer v. Nebraska*, upholding the Fourteenth Amendment right to teach German. Sutherland (and Holmes) dissented. 262 U.S. 390 (1923). On the other hand, in 1931 all the Court’s conservatives dissented from a decision that struck down Minnesota’s laws restraining anti-Semitic and hateful speech. See *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>1157</sup> Postwar legal literature grappled with the politicized distinctions. See Virginia Wood, *Due Process of Law, 1932–1949: The Supreme Court’s Use of a Constitutional Tool* (Baton Rouge: Louisiana State University Press, 1951).

Attorney General Homer Cummings exploited this agreement to advance a bold program to weaken the due process rights of criminal defendants. In doing so they envisaged greater prosecutorial advantages at both the federal and state levels, a point of agreement they could leverage toward their other plans for both the war on crime and judicial reform. Although in the 1930s, as was the case many years later, the vast majority of prosecutions resulted in convictions without trial, both New Deal liberals and constitutional conservatives focused more on the failures to convict those they thought clearly guilty.<sup>1158</sup> While the clash over 1930s constitutional interpretation is often remembered as the last struggle over substantive due process, on the question of procedural due process—protections for the accused—broad agreement set the agenda.

Agreement over criminal procedure welcomed the New Dealers when they took office. By 1933, a campaign of state-level reform was already under way. Dedicated to making the common law more accessible to the public, the American Law Institute completed its model code of criminal procedure in 1930 and soon began petitioning states through its Advisory Committee on Criminal Justice. At first a tension obscured how much the Institute and Roosevelt administration agreed. In March 1933, Institute Director William Draper Lewis phoned White House officials to remind them of the recent practice of hosting the Institute’s members, wives, and special guests.<sup>1159</sup> The next year Lewis expressed disappointment to Roosevelt aide Louis Howe that the president had broken with the tradition of meeting with him and his wife for a reception, but also stressed his agreement that it was now time to work on the substance of criminal law, which needed adjusting to keep up with the complexities of modern civilization.<sup>1160</sup> Indeed, the model code formulated by the Institute, championed by many of the New Deal’s critics at the American Bar Association, resembled the reform agenda touted by Cummings. Emphasizing the agreement that “efficient personnel should not be ham-strung by an archaic and antiquated criminal procedure,” George Z. Medalie credited the ABA’s “aggressive lead, aided measurably” by Cummings’s “law enforcement program,” for having “overcome legislative inertia” and eased the passage of ALI’s “radical procedural improvement” at the state level.<sup>1161</sup>

Cummings made criminal procedure reform a national priority, stressing its cohesion with living constitutionalism, legal modernization, and a progressive program for governance. He believed clumsy deference to procedural rights threatened freedom. Speaking to the ABA, Cummings explained that reforming procedure would “vindicate and enforce substantive rights.” Procedure was “mere machinery,” a means to an end, and when overly complicated and clumsy it threatened to “delay justice.”<sup>1162</sup> To continue to utilize anachronistic process was to ignore the forward march of history. Drawing on a peculiar analogy—former Chief Justice William Howard Taft’s past efforts as colonial administrator to ban headhunting in the Philippines—

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<sup>1158</sup> A survey by the Census Bureau in 1938 found that only about one-fifth of defendants facing prosecution went to trial. *Judicial Criminal Statistics*, U.S. Dept. of Commerce, 1938, 8, in DCBC box 48.

<sup>1159</sup> Attorney General, 27 March 1933, OF10 Box 1: DOJ March–May 1933.

<sup>1160</sup> William Draper Lewis, Director, the American Law Institute, 11 April 1934, OF10 Box 2: DOJ January–April 1934.

<sup>1161</sup> George Z. Medalie, “Making Criminal Prosecution More Effective,” *ABA Journal* 21, No. 8 (August 1935), 504–505.

<sup>1162</sup> Homer Cummings, “Immediate Problems for the Bar,” *ABA Journal* 20, No. 4, April 1934, 212.



Cummings argued that “weird old rituals of primitive peoples were convenient for the medicine men of those early days; but no one would justify them today.”<sup>1163</sup>

Extending their earlier criticism of Prohibition, New Dealers argued that streamlining criminal procedure was necessary in light of rampant corruption and lawlessness. Among the lawless were dishonest attorneys who exploited every loophole to aid their guilty clients. Condemning the “lawyer criminal,” Cummings lamented the ubiquitous belief that an attorney’s “first duty is to his client.” Along with criminal procedure, disbarment proceedings also warranted streamlining.<sup>1164</sup> Cummings condemned those defense attorneys who maintained “close contact with the criminal classes,” who understood and could leverage “cumbersome and archaic procedural rules” with the consequence of delayed trials, sometimes as witnesses died or disappeared, and who mounted an obstructive barrage of “appeals upon frivolous grounds” that prolonged the punishment of the guilty.<sup>1165</sup>

Among Cummings’s major legislative goals of 1934 was a loosening of due process protections. Cummings’s 12-point program sought to prevent statutes of limitations from barring re-indictments. Many of his proposals failed in 1934: statutes to allow testimony between husbands and wives, weaken habeas corpus in some instances, compel alibi defenses to be made in advance, and allow prosecutors in open court to comment upon defendants refusing to testify on their own behalf.<sup>1166</sup> Even the failed proposals found a fair hearing in the *ABA Journal*.<sup>1167</sup> Delegates at Cummings’s December 1934 Crime Conference signed on to many of his procedural reforms, including advance notice requirements for alibi defenses and the allowance of prosecutors to identify silent defendants. In addition there were proposals to provide for alternate jurors, to establish indictment by information as a substitute for the Grand Jury in some cases, and to require only nine out of twelve jurors to convict in most trials.<sup>1168</sup>

Cummings and fellow legal progressives commonly argued that America’s anachronistic due process protections had arisen from its unique and outdated anti-government tradition. The rebellious tradition, according to Cummings, had produced “constitutions and laws” and “guarantees” to defendants of many rights— “the right to counsel, the right to a day in court, the right to a jury trial, the right to have witnesses subpoenaed in his behalf, the right to be tried only upon an indictment found by a grand jury, the right to bail, the right to employ the writ of habeas corpus, the right of the presumption of innocence, the right to be present at his own trial and to be faced by the witnesses who testified against him, the right to be convicted only upon proof beyond reasonable doubt the right of appeal and the rest of the elaborate” protections. Cummings did not want to abolish these rights altogether but he perceived that absolute deference toward their sanctity was strangling American justice.<sup>1169</sup> The Attorney General related his outlook to

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<sup>1163</sup> “Address of Attorney General Cummings to Judicial Conference, Fourth Circuit,” *ABA Journal* 21, No. 7, July 1935, 403.

<sup>1164</sup> Homer S. Cummings, “The Lawyer Criminal” *ABA Journal* 20, No. 2 (Feb 1934), 82.

<sup>1165</sup> “A Twelve Point Program” Address Delivered before Continental Congress of the Daughters of the American Revolution, 19 April 1934, PHSC Box 213.

<sup>1166</sup> “A Twelve Point Program” Address Delivered before Continental Congress of the Daughters of the American Revolution, 19 April 1934, PHSC Box 213.

<sup>1167</sup> “Attorney General Recommends Bills Relating to Criminal Law,” *ABA Journal* 20, No. 5 (April 1934).

<sup>1168</sup> “Resolutions Adopted by the Crime Conference,” *ABA Journal* 21, No. 1 (January 1935).

<sup>1169</sup> Homer Cummings, “Progress Toward a Modern Administration of Criminal Justice in the United States,” *ABA Journal* 22, No. 5 (May 1936), 345. This talk was delivered to the North Carolina Conference for Social Service on 27 April 1936.

the broader project of modernizing liberalism, noting the “striking fashion” in which his appearance in front of a group of social workers illuminated the greater political stakes.<sup>1170</sup> In the *American Bar Association Journal*, legal historian Pierre Crabités, who trained in New Orleans and Paris, both marked by civil law, gave an international perspective compatible with Cummings’s historical narrative. Crabités pointed to France, where judges interrogated defendants but the state still protected the accused. America’s unique anti-state culture, built by “sturdy pioneers who did their own thinking” and “sympathized with the ‘underdog’” was thus inclined to “bring in a verdict of ‘not guilty’ in apparent defiance of the evidence.” This was not the result of politics, corruption, or cowardice, but a distinctly American “sense of fair play.”<sup>1171</sup>

Sometimes both advocates and opponents of criminal procedure reform agreed on the association between due process and tradition. After Louis S. Cohane of Michigan argued that progress in the quality of American jurists made concerns of state oppression obsolete, Otis F. Glenn of Illinois agreed that principles of due process, particularly protections against self-incrimination had a long history—indeed, going back to the common law—and on such a basis argued that it was dangerous to jettison such long-established principles.<sup>1172</sup>

Yet while some defended due process on traditionalist grounds, the most prominent critics of progressive constitutionalism agreed on the need to enhance prosecutorial advantages. ABA surveys and meetings registered strong majorities in support. The ABA sent out 1,450 questionnaires on criminal law. Along with legal education, unauthorized practice, and judge selection, and a section on criminal law and enforcement, a question appeared about the Model Code of Criminal Procedure of the American Law Institute,<sup>1173</sup> and made possible by the ABA.<sup>1174</sup> A report in 1934 indicated that in both rural and larger communities, criminal procedure reform was the highest priority on a list of nine possible concerns including politics and racketeering.<sup>1175</sup> An ABA meeting that year also focused heavily on criminal law reform, along with crime issues in general. The ABA recommended that state and local bar associations established committees on the reform of criminal procedure and on police and prosecution. Basing its proposal on the American Law Institute, the ABA recommended reforms on alibis, testimony, and jurors.<sup>1176</sup>

Despite broad agreement, legal conservatives and legal progressives stressed their differences. When New Deal critics advocated criminal justice reform, they relied on distinctly conservative premises. Chief Justice Charles Evans Hughes, a Republican appointee whose moderate skepticism of progressive economic policy made him the Court’s swing vote, decried the delays in cases going to trial and in appeals preparation. In his address to the ABA, Hughes cited Republican Attorney General William Mitchell’s complaint that “months and even years

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<sup>1170</sup> Homer Cummings, “Progress Toward a Modern Administration of Criminal Justice in the United States,” *ABA Journal* 22, No. 5 (May 1936), 345.

<sup>1171</sup> Hon Pierre Crabités, “Why American Criminal Justice is a Failure,” *ABA Journal* 23 No. 9 (September 1937), 700–702.

<sup>1172</sup> “First National Bar Program Sessions Deals with ‘Criminal Law and Its Enforcement,’” *ABA Journal* 20, No. 10 (Oct 1934), 652.

<sup>1173</sup> “Seek Facts on Criminal Law from the Bar: National Bar Program Questionnaire Asks for Data on Law Enforcement and Reasons for Present Conditions,” *ABA Journal* 20, No. 1 (January 1934).

<sup>1174</sup> George T. McDermott, “The Work of the American Law Institute,” *ABA Journal* 21, No. 9 (September 1935).

<sup>1175</sup> William Shafroth, “The Bar Reports on Some Phases of Criminal Law,” *ABA Journal* 20, No. 8 (August 1934).

<sup>1176</sup> “First National Bar Program Sessions Deals with ‘Criminal Law and Its Enforcement,’” *ABA Journal* 20, No. 10 (October 1934), 647.

have elapsed after verdicts of guilty before appeals were heard. . . and meanwhile the accused have been at large on bail.” Hughes believed that there was likely “no greater reproach to the administration of justice in this country than the delay in criminal appeals.”<sup>1177</sup>

Some of the loudest critics of New Deal legislation argued that Prohibition had tipped the balance too far toward federal authority, and that legal technicalities had inhibited the states’ action. Judge Clarence Martin, a Republican who spent 1920 investigating leftwing radicalism for the Senate, saw the remedy in states asserting and expanding their prosecutorial powers. America was “a crime breeding and criminal protecting nation,” and criminal law had been “hedged” by “legal rules in the trial.” The “presumption of innocence” had produced mechanisms that defendants, if actually innocent, did “not need for protection.” Rules should be made “as simple as possible.” Martin wanted to abolish appeals of right and to stop paroling second offenders. He urged states to adopt the proposed a Uniform Act to simplify indictments, mandate jury service, and lower the threshold to nine out of twelve to convict in non-capital cases.<sup>1178</sup>

Meanwhile, Roosevelt officials worked to orient their position as the reasonable middle ground. Justice Department Special Assistant Justin Miller emphasized the forward advancement of civilization, advocating reforms to make convicting defendants easier, while criticizing overbearing police practices. Miller decried both the “partisan advocate of the rights of the state” and those who always champion “defense of the underdog” even if it meant preserving “antiquated principles of law and rules of procedure” as “more or less sacred.” Noting that 60%–75% guilty determinations came from pleas and that 85% of arrests were disposed before trial, he condemned “third degree” interrogations, and also criticized the “commonly prevalent notion that the crime problem can be solved by more and longer imprisonment.” He could thus stake out a critical attack on both the “shyster lawyers and the lower type of police officers” whose bad training had brought lawlessness on both sides of the adversarial system of justice.<sup>1179</sup>

Despite posturing as opponents, legal conservatives and legal progressives generally pursued the same agenda. Most changes happened at the state level, on which Cummings offered vocal support while the American Bar Association and its allied American Law Institute did the heavy lifting. While there was no definitive pattern of movement toward harsher or lighter punishment, states were streamlining criminal procedure. In 1932, Louisiana consolidated multiple offenses into singular trials. Rhode Island made indictments harder to quash on technicalities.<sup>1180</sup> Law journals optimistically reported the trend of reform and criticized its detractors. In the *ABA Journal*, Philip Kates applauded Oklahoma Supreme Court adopting rule-making authority in a piece called “A New Deal for Justice.”<sup>1181</sup> Legal scholars praised Ohio, Michigan, and Wisconsin for restricting the alibi defense, lest “[T]wo or three lying witnesses. . . easily defeat justice.” Those opposed to reform were using “procedure as a means for gaining a livelihood”

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<sup>1177</sup> Address of Chief Justice Hughes, *ABA Journal* 19, No. 6 (June 1933).

<sup>1178</sup> Hon. Clarence E Martin, “The Growing Impotency of the States,” *ABA Journal* 19, No. 9 (September 1933), 548.

<sup>1179</sup> Justin Miller, “Lawyers and the Administration of Criminal Justice,” *ABA Journal* 20, No. 2 (February 1934).

<sup>1180</sup> Joseph P Chamberlain, “Department of Current Legislation: Criminal Statutes for 1932” *ABA Journal* 19, No. 3 (March 1933).

<sup>1181</sup> Philip Kates, “A New Deal for Justice: Oklahoma Supreme Court Boldly Exercises Power,” *ABA Journal* 20, No. 3 (March 1934).

and so their “reluctance” went “much further than is implied by mere conservatism.”<sup>1182</sup> Another article complained about prosecutors dismissing too many cases, a lack of centralization in prosecution, and vulgar prosecutorial errors letting the guilty free.<sup>1183</sup> State bar associations followed Cummings’s lead in rooting out the “lawyer criminal”—a common term for unscrupulous and lawless attorneys—a species the ABA Journal called on the country to “exterminate.”<sup>1184</sup> The administration monitored progress at the state level; Cummings pondered the fact that most states mirrored the Sixth Amendment prohibition on statements used by witnesses “done away with by the connivance of the defendant.”<sup>1185</sup>

Agreement between the ABA and the Roosevelt administration carried over from criminal procedure to the war on crime generally. In the summer of 1936, ABA President William Ransom invited Cummings to preside over a session in Boston, eager to accommodate the Attorney General’s tentative acceptance and to schedule a broadcast according to his preferences.<sup>1186</sup> In August Cummings expressed his pleasant surprise to Roosevelt that, as he heard it, an ABA meeting in Los Angeles had not demonstrated much hostility toward the administration. Cummings had anticipated that detractors would “turn it into an anti-Roosevelt meeting,” but despite murmurs of criticism the meeting showcased a “great deal of praise” for the “Attorney General in connection with the crime program.” The ABA also applauded the progress on empowering the Supreme Court on laws on actions, which the organization had advocated without success for decades.<sup>1187</sup> At the end of the year Cummings was surprised yet again by a Bar Association gathering in New York. He had braced himself for “a rather chilly reception” but instead “the applause at the close amounted to an ovation. . . . Evidently the Liberty Leaguers have not as many followers as they had supposed.”<sup>1188</sup> Whatever the median attendee’s opinions on the New Deal, Cummings was right that Roosevelt had wide support on criminal law.

The favorable ABA reception that Cummings encountered spoke to a larger 1930s consensus over criminal procedure that had significant implications for the future of the war on crime coalition and the trajectory of policy. The coalition found encouragement in developments, especially at the state level, for an active crusade against lawbreakers. Both New Dealers and their domestic critics could henceforth claim the mantle of reform for their own political programs. In the long run, an expansive role of the federal judiciary in overseeing criminal procedure would produce contradictory results for those who believed the courtroom had become too friendly to criminal defendants. In the short term, it allowed a new sort of federalism to take

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<sup>1182</sup> “Criminal Procedure and Rule-Making Authority,” 18 *Journal of the American Judicature Society* 187 (1935), 187.

<sup>1183</sup> Newman F. Baker; Earl H. DeLong, “Prosecuting Attorney—Powers and Duties in Criminal Prosecution,” 24 *American Institute of Criminal Law and Criminology* 1025 (1934). In one example of prosecutorial vulgarity, a prosecutor called the defendant a “human gorilla,” “a slobbering wild boar,” and a “mad dog.” See Newman F. Baker, “Prosecuting Attorney: Legal Aspects of the Office,” 26 *American Institute of Criminal Law and Criminology* 647 (1936).

<sup>1184</sup> “Exterminate the ‘Lawyer Criminal’” *ABA Journal* 19, No. 11, November 1933

<sup>1185</sup> Cummings to Howe, 26 April 1934, OF10 DOJ Box 2, Folder: Jan–Apr 1934.

<sup>1186</sup> Ransom to Cummings, 23 May 1936; Cummings to Ransom, 2 June 1936; Ransom to Cummings, 4 July 1936, PHSC Box 71: Bar Association Correspondence; Cummings to Ransom, 8 July 1936, PHSC Box 71: Bar Association Correspondence.

<sup>1187</sup> To Roosevelt, 5 August 1935, OF10 Box 2: DOJ Mar–Aug 1935.

<sup>1188</sup> Cummings to President, 23 December 1935, OF10 Box 3: DOJ Sept–Dec 1935.

root, one in which federal and state governments became active partners in an amplified war on crime.

### The Constitutional Discourse of War on Crime Federalism

Cummings saw unreconstructed federalism and anachronistic due process protections as co-conspirators and twin evils, spawned in the depths of American tradition. A historical hostility to state oppression had constrained the national government as much as it had restrained prosecutors. America's traditionally recalcitrant culture, now combined with technological developments and waves of purportedly unruly immigrants—a newly “heterogeneous population”—exposed in America's unworkable federalism a jurisdictional “twilight zone” problem, where criminals eluded either national or state enforcement.<sup>1189</sup> This concern about jurisdictional limitations had risen with automobiles, interstate abductions and robberies, and Cummings appeared to extend the anxiety to a more vaguely and capaciously defined class of lawlessness. Only national coordination could serve the “progressive control of crime,” and traverse the “natural corridor, unpoliced and unprotected” that had allowed an “unholy sanctuary of predatory vice.”<sup>1190</sup> On this basic principle, Cummings found a lot of agreement across the aisle. Whereas on many domestic issues the New Dealers and their opposition argued loudly on questions of federalism, the war on crime allowed common ground.

Under Cummings and Roosevelt, the relationship between federal and state power transformed. Prohibition had brought Cummings's dreaded “twilight zone” to the forefront, and for the war on crime to work, the upside-down federalism of the Volstead era would have to be reversed. The “concurrent enforcement” of the Eighteenth Amendment, by both the federal and state governments, had produced unsatisfactory results all around, as proponents of a strong federal government could blame uneven enforcement on the states' neglect, and states rights' critics of federal prohibition could blame Treasury corruption or argue for more state-level activity. The New Deal war on crime spelled the end of this zero-sum game in American

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<sup>1189</sup> On federalism in general, New Dealers tended to frame the great constitutional controversy as one between the voices of progress and the voices of reaction. Cummings positioned himself in opposition to constitutional conservatives, to “the more ‘static’ members of the bar” worried about the “legal aspects and implications” of recent policy developments. Cummings reassured an audience that the New Deal did not mean a “new social order,” but rather treated “ideas and principles as living and vital things”—yielding a dynamic constitutionalism that transcended such tropes as ‘economic law,’ ‘fundamental liberty,’ ‘equality of opportunity,’ and ‘social justice.’” Cummings postured as a moderate compared to those who wanted the federal government to take total command of previously local matters like “racketeering, kidnapping, and the whole problem of crime.” But it was a time of emergency, and just as World War I saw new powers in the form of Selective Service, Espionage, the War Industries Board, the Food Administration, the Control of Railroads, Industrial Mobilization” so too would the New Deal respond to the peacetime emergency. Homer Cummings, “Modern Tendencies and the Law,” *ABA Journal* 19, No. 10. Despite a remarkable consensus on crime and federalism, Cummings stressed disagreement. In January 1936 he reflected on the fraught historical distrust of federal power—from the Virginia and Kentucky Resolutions, the Nullification crisis, Reconstruction, exposed the breach between federal and state. Man's “insatiable desire for certainty” means everyone is so sure of their side. But the Constitution was an “organic process of government,” mandating a “process of adaptation and growth” and not a “legalistic vacuum.” Cummings disbelieved any “absolute theory of one and only one rational construction of the Constitution.” Homer S. Cummings, “The American Constitutional Method,” *ABA Journal* 22, No. 1 (January 1936).

<sup>1190</sup> “Progress Toward a Modern Administration of Criminal Justice in the United States” before the North Carolina Conference for Social Welfare, 27 April 1936, in Swisher, *Selected Papers of Homer Cummings* 45–8.

federalism. All levels of government continued to wage the war, but cooperation rather than mutual hostility and skepticism now defined the relationship between Washington, DC, and the states.<sup>1191</sup>

After Prohibition, reconsideration of the boundaries of federalism inspired concerted thought about power at both the federal and state levels. Raymond Moley, charged with conducting a report on the problem of crime, pointed out in his first installment in March 1934 that the severity of American crime and recent federal successes had “produced a considerable opinion in favor of enlargements in general criminal jurisdiction.”<sup>1192</sup> Gordon Dean, Criminal Division attorney and spokesman for the Justice Department, regarded the answer as to whether federal, state, or local authority ought to manage “a given type of criminal conduct” to be one of the “fundamental problems in the formulation of any systematic program of crime repression.”<sup>1193</sup> In a *Manchester Guardian* article Roosevelt found “extremely interesting,” Harold Laski criticized American federalism for its onerous constitutional amendment process and hoped for an activist “positive State.” This would require Roosevelt to “remake the American Constitution upon a model to which the document of 1787 will bear no substantial resemblance.” Roosevelt found “extremely interesting” a *Manchester Guardian* column by Harold Laski identifying a deep structural problem in American federalism, where the Supreme Court prevented the rise of a properly “positive State.”<sup>1194</sup>

A perceived need for increased activity at both the federal and state levels encouraged a mutual deference, and even ardent progressive centralizers stopped short of a unitary state.<sup>1195</sup> Indeed, Cummings’s Justice Department repeatedly stressed that it had no intention of displacing the role of the several states. Pointing to the Senate Committee on Crime and the Special Division on Racketeering and Kidnapping, Cummings insisted these “measures are not calculated to place the Federal government in control of the crime situation of the country. It is not our purpose to invite local organizations to turn over their problems to the Federal government.” In his speech at the 1934 National Crime Conference, Justin Miller called “absolutely untrue” and “entirely misleading” the claims in a well-respected periodical that

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<sup>1191</sup> Maria Ponomarenko focuses on the incompleteness of the New Deal Justice Department’s expansive oversight of the states in areas of antitrust, the FBI, prison administration, and police brutality, but without much emphasis on the legitimating function of the new settlement between national and state authorities. Indeed, Ponomarenko casts the Justice Department as somewhat at the “periphery of the New Deal state.” Ponomarenko, *The Department of Justice and the Limits of the New Deal State, 1933–1945*, Dissertation, Stanford University, 2010, 10.

<sup>1192</sup> Raymond Moley, “To the President, First of Three Sections of a Report. . . “ 15 May 1934, OF10 Box 2: DOJ May–June 1934.

<sup>1193</sup> Gordon Dean, Interstate Compacts for Crime Control, *ABA Journal* 21, No. 2 (February 1935), 89.

<sup>1194</sup> Memorandum for the Attorney General, 5 July 1935, OF10 Box 3: DOJ June–August 1935. Laski wrote two columns for the *Guardian* in June 1935. It is uncertain which one Roosevelt was referring to, both of them radically critiqued American constitutionalism and lamented the Supreme Court’s obstruction of the “positive State.” The second one focused more on federalism, criticized the clumsy amendment process, and urged Roosevelt to “remake the American Constitution upon a model to which the document of 1787 will bear no substantial resemblance,” so it is perhaps the more likely of the two articles to grab Roosevelt’s attention. See Harold J. Laski, “Dilemma of Government,” *The Manchester Guardian*, 17 June 1935; and Laski, “States Rights and Nation’s Needs,” *Manchester Guardian*, 18 June 1935.

<sup>1195</sup> The transformation of American federalism through compacts was a conspicuous process. See David Riesman, Book Review of *The Rise of a New Federalism* by Jane Perry Clark, 52 *Harvard Law Review* 175 (1938).

federal legislation had that year “definitively revised the traditional American policy of state crime control.”<sup>1196</sup>

Many ideological progressives positioned themselves between nationalist and states’ rights extremes. Police reformer August Vollmer saw the need for more centralization at all levels of government but respected the limits of American nationalization. He was “sure centralization and nationalization” in Cuba’s police forces was “a step in the right direction.”<sup>1197</sup> Writing to J. Edgar Hoover in March 1935, Vollmer agreed with the Bureau chief on the need for a “national police hookup [to] strengthen” law enforcement, and blamed decentralized policing for allowing criminals “to impose their will upon the people.”<sup>1198</sup> But while Vollmer consistently favored interstate coordination and saw Cummings’s Justice Department as models for centralization, he was more nuanced on the idea of a national police force. He reassured Captain N.H. Niles that his “proposal for a national police system is unquestionably sound,” but reiterated his priority for “centralization of all police activities in each state and the elimination of fictitious political barriers.” He saw the “city and the county [as] no longer the wise police unit,” advocating a “head of a police department [to] control of all police activities in the state.” Leadership should have power commensurate to “the scope of the problem” which was “no longer a local affair.”<sup>1199</sup> He wanted each state to have a centralized police force run by a “Minister of Justice.” But he also thought believed “a federal police force would be a dangerous experiment in this country” and stressed to Leonard Nusbaum that the Wickersham Commission had not recommended a national police force because the U.S. Constitution would prohibit it barring amendment.<sup>1200</sup> Vollmer’s protégé Orlando Wilson also understood that the Constitution imposed limits on federal activity. Wilson told Vollmer he objected to a plan for a “federal, state, municipal cooperative police system. . . on the ground that such a police scheme as not intended by the founders of our constitution.” He considered federal control over city policy “highly undesirable” and instead favored “a state, municipal cooperative police system, leaving he federal government out of the picture.”<sup>1201</sup> As with criminal procedure, legal liberals claimed a middle ground.

Conservative jurists disagreed with the New Dealers’ emphasis on federalism, and yet agreed substantively on the need for more federal action. James M. Beck, writing in September 1933, cautioned Americans against their “illusion” of “limited powers,” a conviction no longer held by the president and Congress.<sup>1202</sup> Pointing to the failures of alcohol prohibition, Clarence E. Martin characterized repeal as an admission about the limits of the national state, and drew on the experience in an argument against a federal Child Labor Amendment, inspired by the Eighteenth Amendment. His warning about abandoning “the structure the Fathers” produced of “concentrating tendencies” toward “nationalizing and socializing our governmental structure,” was not an aberration.<sup>1203</sup> Martin thought alcohol prohibition a cautionary tale against national

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<sup>1196</sup> Justin Miller, “The Federal Government and the Crime Problem,” National Conference on Crime, 12 December 1934; Homer Cummings, “Immediate Problems for the Bar,” *ABA Journal* 20, No. 4 (April 1934), 212.

<sup>1197</sup> Vollmer to Jose Grau Aguero, Secretaria de Gobernacion, 15 February 1935, AVP Box 44.

<sup>1198</sup> Vollmer to J.E. Hoover, 2 March 1935, AVP Box 44.

<sup>1199</sup> Vollmer to Captain H.M. Niles, 11 June 1934, AVP Box 43.

<sup>1200</sup> Vollmer to Leonard H. Nusbaum, 17 November 1933, AVP Box 42

<sup>1201</sup> Wilson to Vollmer, 5 September 1934, OWWP Box 1: “Letters Written by Wilson, 1928–1938.”

<sup>1202</sup> James M. Beck, “The Future of the Constitution” *ABA Journal* 19, No. 9 (September 1933) 489.

<sup>1203</sup> Clarence E. Martin, “Shall We Abolish Our Republican Form of Government,” *ABA Journal* 19, No. 8 (August 1933), 435.

overreach, but he agreed that both states and the national government could and should expand and coordinate their powers. Americans demanded federal responses to “criminal conspiracies” with “no regard for state lines or national boundaries.” In his view, the Mann Act had been an appropriate escalation of national power. But the states needed to assert themselves. The disaster of prohibition had shown that “the general government is unable to enforce local police powers,” and although this portended problems with a national child labor policy, that did not mean Martin advocated laissez faire. Child labor was “inhuman” and should be criminalized, but at the state level, where “No laws can be too stringent.” National overreach did not only threaten republican liberty. It threatened to substitute “state socialism for social justice.”<sup>1204</sup> Aside from Martin, critics like John Dickinson agreed that jurisdictional difficulties yielded an intolerable situation, effectively giving lawbreakers “immunity from arrest and punishment.” Dickinson defended the constitutionality and need for such laws as the Mann Act, the Fugitive Felon and Witness Act, the Federal bank robbery laws justified under *McCullough vs. Maryland*, and the National Firearms Act. Dickinson applauded the judicial upholding of the Pure Food and Drug Act but was critical of federal interference in states policing their own borders.<sup>1205</sup>

By agreeing in substance while differing in rhetorical emphasis, conservatives ensured an opening for the New Dealers to champion war on crime federalism as a middle position between states-rights conservatism and extreme nationalism. John J. Parker characterized the division in formal terms. In “clinging to form,” he wrote, conservatives “lose substance,” whereas progressives “lose substance in their desire for change of form.” Parker acknowledged the “sovereign powers reserved to the states” and opposed “state socialism.” At the same time he saw federal power as a check on “inefficient and corrupt” state governments and welcomed the “definitive passing of the laissez faire theory of government” in the name of emergency powers.<sup>1206</sup> In championing the sweeping slate of crime legislation in May 1934, Congressman Ruffin pointed to the “strong clamor for the Federal Government to step forward and take a more active part in fighting crime.” In particular, “Some would have the Federal Government take over the entire police power from the States and centralize the control of it in Washington”<sup>1207</sup> Such a revolution would be unacceptable, Ruffin argued, but the status quo of impotent federal power was also intolerable.

The escalation of federal law-enforcement activity did not spur a retreat by state officials. Under war on crime federalism, both the states and federal governments centralized and expanded, usually in complementary ways. The states became swept up in the national drive toward taking crime more seriously. The Senate and administration’s increasing interest in street-level offenses even encouraged a deference toward state and local governments, whose footwork made possible efforts at coordinating crime control. The national war on crime therefore accommodated an intensification of local activity, especially through its involvement in immigration, its informational commissions, and its encouragement of compacts and coordinating function.

Immigration and informational functions served to bridge federal to state power. J Weston Allen railed against the “repeated failure of Congress” to act upon the “menace and burden of the

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<sup>1204</sup> Clarence E. Martin, “The Growing Impotency of the States,” *ABA Journal* 19, No. 9 (September 1933).

<sup>1205</sup> John Dickinson, “Crime and the Constitution,” *ABA Journal* 21, No. 11 (November 1935), 739–743.

<sup>1206</sup> Hon. John J. Parker, “Is the Constitution Passing?” *ABA Journal* 19, No. 9, 570–575.

<sup>1207</sup> Congressional Record, Proceedings and Debates of the Second Sessions of the 73<sup>rd</sup> Congress of the United States, Volume 78, 6854.



criminal alien.” Bills before Congress suggested deporting any drug violators, illegal alien smugglers, or those with concealed and dangerous weapons.<sup>1208</sup> The federal government also stepped up its role in disseminating information. In 1937 the Senate Subcommittee published findings on firearms control including the licensing of merchants, interstate movement of stolen property, interstate traffic and automobile sales regulation, fingerprinting, proposed legislation to prohibit felonious fugitives from conducting interstate commerce, racketeering, the Lindbergh law, increased Sherman Antitrust penalties, various other changes to the criminal code, poultry regulation, and proposals to burden criminal defendants with heavier evidentiary requirements and subject them to jury trials requiring only three-fourths majorities to convict, except in capital cases. The committee estimated that crime cost America about \$13 billion a year and lamented youth criminality.<sup>1209</sup> The Interstate Crime Commission, meanwhile, made various recommendations to assist the states.<sup>1210</sup> Uniform state laws would help interstate “close pursuit” cases, and a Uniform Act on Interstate Extradition would go a long way. An Indiana–Illinois draft of legislation allowed out-of-state supervision of parolees and probationers. Calling witnesses from other states was also considered. Some other recommendations included state-level bureaus of criminal identification, fingerprinting for cars and drivers’ licenses.

Most important, the federal government served the state governments by facilitating coordination. Coordination brought together Progressives and conservatives. Loyal New Dealer Hatton W. Summers, powerful chairman of the House Judiciary Committee, took particular interest in HR 7353, which encouraged cooperation among states.<sup>1211</sup> J. Edgar Hoover, in celebrating the Division of Investigation’s apprehension of suspects in the kidnapping of oil magnate Charles F. Urshel, called the case “an excellent illustration of the interstate character which the ramifications of a single offense may assume,” He believed Cummings’s legislation “unquestionably owes its existence to the realization that modern means of transportation and communication have given organized criminal activities an interstate character, the combating of which requires the assistance of a federal enforcing agency not restricted to state boundaries.”<sup>1212</sup> Justin Miller called for more coordination in an ABA meeting in 1934.<sup>1213</sup> The lack of coordination, Miller explained the next year, was “the most striking discrepancy in the national attack on crime.” He lamented that “[e]ach city, each county, each state, has carried on a campaign of its own, of greater or less intensity, without much regard for the others.”<sup>1214</sup> Conventions encouraged interstate cooperation. A 1934 Milwaukee Convention of the American Bar Association called upon America’s governors to coordinate their efforts and adopt model criminal codes.<sup>1215</sup>

In May 1934 Congress encouraged interstate compacts to fight crime. The Interstate Compact Bill gave “blanket congressional consent in advance to all compacts entered into by any two or more states in the field of the ‘prevention of crime and the enforcement of their respective

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<sup>1208</sup> J. Weston Allen, *Deportation of the Criminal Alien*, *ABA Journal* 21, No. 10 (October 1935), 677.

<sup>1209</sup> *Crime and Criminal Practices*, 75<sup>th</sup> Congress, 1<sup>st</sup> Session, Senate Report no. 1189, 9 August 1937, 5–7, 12, 14.

<sup>1210</sup> “Interstate Crime Commission Makes Recommendations,” *ABA Journal* 22, No. 1 (January 1936).

<sup>1211</sup> The Attorney General, 5 June 1934 OF10, Box 2: DOJ May–June 1934.

<sup>1212</sup> John Edgar Hoover, *Work of the Division of Investigation*, United States Department of Justice, 13 *Tennessee Law Review* 149 (1935), 149, 150.

<sup>1213</sup> “First National Bar Program Sessions Deals with ‘Criminal Law and Its Enforcement,’” *ABA Journal* 20, No. 10 (Oct 1934), 647.

<sup>1214</sup> Justin Miller, “The Attorney General’s Program for Crime Control,” *ABA Journal* 21, No. 8 (August 1935).

<sup>1215</sup> “Coordination in Order,” *Washington Post*, September 1, 1934, 8.

criminal laws and policies.”” Gordon Dean emphasized that any appeal to states’ rights should acknowledge “corresponding state duties, and in this fundamental sense the compact statute of the 73<sup>rd</sup> Congress is a direct challenge to the states.” Different approaches included pursuing officers, witness, joint agencies, interstate supervision of detainees. A Fugitive Felon law would make it illegal to flee a state to avoid testifying. By the next February, around seventy compacts were approved by Congress.<sup>1216</sup>

Not only did the states coordinate with one another, but, following Washington’s lead, they sometimes moved to centralize and expand their own crime fighting capacities. Governors across the political spectrum acted. Massachusetts Governor Joseph Ely, a conservative Democrat, proposed centralizing the police under his authority.<sup>1217</sup> Texas Governor James V. Allred, a Democratic New Dealer and firm supporter of Roosevelt, won office condemning his predecessor for being too liberal with clemency and promising a more systematic approach to law breaking. “War has been declared against the lawless elements of Texas with the inauguration of a new State administration,” the *New York Times* reported.<sup>1218</sup> There were multiple models of state-level centralization. An extreme unfolded in Louisiana. Reformers looked to Huey Long’s virtual dictatorship as a cautionary tale. As of 1935, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Texas and Utah were deliberating on procedure reform, or state departments of justice, unification of law enforcement agencies, or state police.<sup>1219</sup>

In New York, Governor Herbert Lehman’s war on crime mirrored the Roosevelt agenda. New York saw one of the nation’s most ambitious state-level wars on crime, one specifically touted by Roosevelt for its progressive approach. A large 1935 conference hosted by the governor, “Crime, the Criminal and Society,” gave voice to all manner of reform proposals, from the governor’s idea of universal fingerprinting to Republican former U.S. Attorney George Medalie’s proposal that Attorneys General be appointed rather than elected.<sup>1220</sup> Cummings took notice, wondering why Lehman’s conference had drawn more attention than New Jersey’s.<sup>1221</sup> The *Times* referred to Lehman’s “war on crime,” pointing to his sixty-point law-and-order program, which included the creation of a state-level Department of Justice modeled after Washington’s.<sup>1222</sup> In describing the atmosphere created by Thomas E. Dewey, a special prosecutor appointed by Lehman who stressed tight coordination with police, assistance from Washington, and secrecy, the *Times* reported that “what he is doing now very much suggests the beginning of a war.”<sup>1223</sup>

If New York was a state-level surrogate for New Deal centralization, California demonstrated the flexibility of war on crime federalism. California had undergone its own centralization, but resisted interstate coordination. It had a state department of justice. Law enforcement brought together numerous agencies. State regulatory boards and the agricultural department worked together. Traffic was brought into the realm of criminal justice. There was a

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<sup>1216</sup> Gordon Dean, “Interstate Compacts for Crime Control,” *ABA Journal* 21, No. 2 (February 1935), 89–90.

<sup>1217</sup> “Massachusetts Police,” *New York Times*, 14 March 1934, 18.

<sup>1218</sup> Peter Molyneux, “Texas Governor to War on Crime,” *New York Times*, 20 January 1935, E7.

<sup>1219</sup> “State Bar Activity in Fields of Criminal Law and Judicial Selection,” *ABA Journal* 21, No. 2 (February 1935).

<sup>1220</sup> James M. Kieran, “Lehman Maps Out State Crime War,” *New York Times*, October 6, 1935, 68.

<sup>1221</sup> Attorney General, 4 November 1935, OF DOJ Box 3, Folder: Sep–Dec 1935, Abstracts.

<sup>1222</sup> W.A. Warn, “Lehman Opens Way for War on Crime,” *New York Times*, 12 January 1936, E12.

<sup>1223</sup> Russell Owen, “Dewey Seeks Allies for a War on Crime,” *New York Times*, 7 July 1935, E10; Herbert Lehman to Harry F. Guggenheim, 15 June 1937, ILP Box 56, Folder 8.

move toward modern police methods and streamlined due process. As Judge William A. Beasley put it, “California has always been advanced in its attitude toward crime.”<sup>1224</sup> At the same time, California was an early site of resistance toward the federal war on crime. The San Francisco Police Commissioners protested the transformation of Alcatraz into a federal prison in October 1933. Territorially jealous, they worried that the penitentiary “within the boundaries of the City and County of San Francisco” would pose problems locally by housing “criminals. . . considered too dangerous to be made inmates of the various federal penitentiaries now existing in other parts of the United States.” The “presence within San Francisco of the associates of such convicted criminals” would bring “prejudice” against the city.<sup>1225</sup> For parochial reasons, San Francisco’s police department resisted a New Deal criminal justice measure embodying a punitive strategy far from Vollmer’s ideal.

California’s Republican Governor Frank Merriam typified the California approach of favoring state centralization while reserving skepticism toward interstate cooperation.<sup>1226</sup> He used the state militia to “maintain peace and order” in San Francisco during the 1934 waterfront strike, approved state border enforcement to exclude migrants “likely to become a public charge,” and in 1935 favored centralization of roads under the state government.<sup>1227</sup> He agreed with August Vollmer on state-level centralization and professionalization and they both attended a March 1935 Western States Anti-Crime Conference, but otherwise they diverged on interstate cooperation. Vollmer suspected that his support of incumbent C.C. Young against Merriam in 1932 had made the governor discount his advice,<sup>1228</sup> but the friction arose especially on the substantive issue of the Interstate Commerce Commission. Starting in January 1936 Vollmer was frustrated by Merriam’s slow responses to his questions about the ICC and California law.<sup>1229</sup> In February he sent a reminder that the State Relief Commission asked Merriam to convene the western governors to “consider the transient problem,” pointing to the annual rise of crime from October through April “due to the influx of these migratory adolescents” and “professional criminals.” Vollmer opposed jail for these young people, but thought interstate crime was necessary.<sup>1230</sup> Merriam was skeptical, since California’s “transient situation. . . is different from

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<sup>1224</sup> Hon. William A. Beasley, “California Unifies Enforcement Agencies to Fight Crime,” *ABA Journal* 20, No. 12 (December 1934), 757.

<sup>1225</sup> Record 29, 16 October 1933, SFPDRSFPL.

<sup>1226</sup> Vollmer shared his frustrations with Clarence Beck at the Topeka Attorney General’s Office. “I agree with you that the states ought to support the Interstate Commission on Crime,” he concurred, “but it is possible that the Governor of this state may think differently.” Vollmer to Clarence V. Beck, 19 March 1936, AVP Box 44.

<sup>1227</sup> Frank F. Merriam, Executive Department, State of California, Proclamation, 5 July 1934, FFMP Carton 1: Proclamations, 1934–36; An Act to Prevent the Entry into California of Paupers and Persons Likely to Become Public Charges; Providing Means for Enforcing the Same: Prescribing Penalties for the Violation Thereof, FFMP Carton 1: Misc. to be sorted – 2.

<sup>1228</sup> Vollmer characteristically estimated that 90% of police were unqualified, wasting 80% of tax dollars, and Merriam disclaimed that only a “stronger, more determined, more intelligent [police] organization” could combat organized crime. “Educated Policemen Demanded: West Opens War on Crime Higher Standard of Peace Officers’ Training Urged at Conference,” *Los Angeles Times*, 22 March 1935; Vollmer to Charles H Bock, 27 May 1935, AVP Box 44.

<sup>1229</sup> Vollmer to Frank Merriam, 6 January 1936, AVP Box 44; Merriam to Vollmer, 10 January 1936, AVP Box 22; Vollmer to Frank Merriam, 20 January 1936, AVP Box 44.

<sup>1230</sup> Vollmer to Frank F Merriam, 3 February 1936, AVP Box 44.

that of the other Western States.”<sup>1231</sup> He passed on Vollmer’s concerns to the legislative bureau, but Vollmer’s dream of interstate coordination was thwarted.<sup>1232</sup>

Merriam’s conservatism demonstrated the flexibility of war on crime federalism. Merriam partially came around, signing two of the bills Vollmer urged in May 1937, but generally Vollmer was frustrated in repeating his requests for the governor’s assistance. He noted three bills approved by the ICC and both houses of the legislature, awaiting the governor’s signature.<sup>1233</sup> After Merriam appointed him commissioner to the ICC, Vollmer asked for two more appointments<sup>1234</sup> Harthorne’s requested the two additional delegates as well as an “annual contribution [of] \$1,160.40 and the governor’s signature for the “Interstate Compact for the supervision of parolees and probationers.”<sup>1235</sup> When Culbert Polson replaced Merriam, Vollmer hoped “that the new Governor may support the Commission better . . . . [I]n fact, Merriam has done nothing to aid us.”<sup>1236</sup>

In the longer term, Vollmer’s interstate vision was indeed more appealing to fellow progressives. California’s Attorney General Earl Warren, whom Vollmer had recommended Merriam appoint to the interstate crime commission, championed the new federalism, claiming the middle-ground position. Everyone agreed, he said, that there was “altogether too much crime,” and he urged a recognition that “no one knows and understands the American crime problem as a whole.”<sup>1237</sup> He believed American was always and would always remain a serious problem, but that if “this country were no larger than California, and that if it had both natural and political boundaries as impassable as those of European nations, many of our major crime problems would fall of their own weight.” Warren identified his take as the most reasonable one among radical, untenable approaches. He thought the police were mostly well-meaning and high quality—an assessment he did not share exactly with Vollmer. Warren outlined four proposals—federal centralization, state centralization, the status quo, and more federal supervision—to identify his own as the reasonable path. National centralization, he argued, should be “dismissed with the statement that it is not the American way of doing things.” Each state adopting its own department of justice, however, was far more reasonable. As he noted, the ABA also recommended each state create its own department of justice.<sup>1238</sup> Warren’s enthusiasm for state-level crime fighting, within a modified American federalism, marked a momentous development in legal liberals’ thought.

The limits of its bipartisan potential notwithstanding, the consensus over war on crime federalism peaked in the late 1930s with conspicuous results. In October 1937 the *Washington Post* hailed the coordination among federal, state, and local officials, declared the end of debilitating “jealousies” between the various jurisdictions after four years of heavy cooperation, and described such impressive new federal resources as the FBI’s G-Men and the new prison at

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<sup>1231</sup> Merriam to Vollmer, 14 February 1936, AVP Box 22.

<sup>1232</sup> Merriam to Vollmer, 21 February 1936, AVP Box 22.

<sup>1233</sup> Mark Lee Megladdery, Jr. to Vollmer, 17 May 1937, AVP 22; Merriam Vollmer to Frank E. Merriam, 5 May 1937, AVP Box 45.

<sup>1234</sup> Vollmer to Frank F Merriam, 14 May 1937, AVP Box 45.

<sup>1235</sup> Vollmer to Frank Merriam, June 1937, AVP Box 45; To Frank F Merriam, 5 February 1938, AVP Box 45.

<sup>1236</sup> Vollmer to Harshorne, 2 December 1938, AVP Box 45.

<sup>1237</sup> Vollmer to Harshorne, 2 December 1938, AVP Box 45.

<sup>1238</sup> Earl Warren, “A State Department of Justice,” National Bar Program Addresses on the Criminal Law and its Enforcement,” *ABA Journal* 21, No. 8 (August 1935): 495.

Alcatraz.<sup>1239</sup> On the front page the paper summarized that by working together, federal and local officials had “brought about a ‘New Deal’ in America’s war on crime.”<sup>1240</sup> Up and down America’s institutions, this New Deal ushered in expansive expectations of what government could do in pursuit of lawbreakers.

### The Other Police Power

Under war on crime federalism, federal and state power had weakened their legal constraints, a phenomenon obscured by the 1937 showdown over the Supreme Court. The term “police power” often refers to authority over economic regulation, and even on these questions there was more convergence than is sometimes remembered.<sup>1241</sup> But on the other police power, there was much more consensus, which converged around criminal procedure reform and war on crime federalism to support expanding the criminal justice powers of the state and federal governments. By the late 1930s, this consensus had favored a more powerful government, particularly at the national level.<sup>1242</sup> The consensus was weakest on questions of civil rights, where state and federal authority continued to stand in opposition. The federalism developed in the New Deal nevertheless allowed for both Jim Crow Democrats and African-Americans to hold out some degree of hope, even as it provided the framework for a racially repressive carceral apparatus. In general, the broad support for expansive law enforcement police power carried neglected long-term implications for American governance.

This is not to downplay the importance of the constitutional argument over the New Deal that peaked in 1937. Beginning in 1933, the administration saw a conservative judiciary as an impediment to its domestic agenda, and contemplated legislation to sway the courts in its favor. One proposal was to amend the Constitution to prevent a bare majority from finding federal laws unconstitutional.<sup>1243</sup> Having caught wind of the research by Karl L. Genck, who found that by a margin of 12,001 to 3,475, Americans would support changes to the Constitution to make Roosevelt’s policies more effective, Roosevelt thought Genck might be a “useful man.”<sup>1244</sup> Although in 1935 the Supreme Court upheld the administration’s retreat from the gold standard, Justice Roberts joined the Four Horsemen in overturning the Railroad Pension Act in 1935. The National Industrial Relations Act was unanimously overturned in 1935 and a 6–3 majority repudiated important parts of the Agricultural Adjustment Act early the next year.<sup>1245</sup> The Court began shifting in favor of upholding both federal and state social legislation when in 1937 Roosevelt and Cummings announced their plan to pack the Court with judges friendly to the

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<sup>1239</sup> Edward T. Folliard, “U.S., Local Officers Wipe Out Jealousies,” *The Washington Post*, 17 October 1937, B5.

<sup>1240</sup> “A ‘New Deal’ Against Crime,” *Washington Post*, 17 October 1937, 1.

<sup>1241</sup> The constitutional debate over economic policy served the primary political narratives of the time.

<sup>1242</sup> G. Edward White points out that *Lochner* was as much about “police power” as “due process.” *Constitution and the New Deal*, 265.

<sup>1243</sup> The Attorney General, “Will you speak to me about this at your convenience,” 11 February 1935, OF10 Box 4: DOJ Jan–Feb 1935.

<sup>1244</sup> Attorney General, 17 June 1935, OF10 Box 3: DOJ June–August 1935.

<sup>1245</sup> 294 U.S. 317 (1935); 295 U.S. 330 (1935); 295 U.S. 495 (1935); 297 U.S. 1 (1936). As Clarence J. Shearn, Jr., argued, very few “split decisions” had actually undercut specifically New Deal programs. “Split Decisions in the Supreme Court in Invalidating Federal and State Enactments and Attempted Exercises of Power, 1933–1937,” *ABA Journal* 23, No. 5 (May 1937), 329–330. Osmond K. Fraenkel identified post-*Schechter* as the “twilight of states’ rights.” “Constitutional Issues in the Supreme Court 1936 Term,” 86 U. Pa. L. Rev. 38 (1937–1938).

New Deal. A special issue of the ABA Journal was dedicated almost entirely to criticizing the court-packing plan. Frederick Stichfield cautioned about “an All-Powerful Central Government with the Rights of the States Subordinated.”<sup>1246</sup> The legal debate over economic policy was indeed central to American politics.

In fact, to criticize the court-packing plan, conservatives willingly adopted liberal rhetoric on individual rights and civil liberties. Republican William J. Donovan, a former U.S. Attorney who had vigorously enforced Prohibition, argued that by threatening the Supreme Court’s independence Roosevelt was also threatening “minority rights.” Among those “rights” were those of white Southerners, whose freedom privately to discriminate against African-Americans the Supreme Court was “courageous” to protect in *United States v. Reese*, *United States v. Cruikshank*, and the *Civil Rights Cases*. But other rights the Supreme Court protected included the rights of black defendants in Kentucky, West Virginia, Alabama, and Mississippi, the habeas corpus rights of Chinese immigrants, the rights of German immigrants to teach their language, the rights of Catholics to have religious schools in Oregon, and the rights of political minorities to free speech.<sup>1247</sup> Cummings and Roosevelt, meanwhile, saw the court-packing strategy as an important component in their effort to reform and modernize the judiciary, which they related back to their efforts to make criminal justice work better.<sup>1248</sup>

But even as the New Dealers and their critics struggled over judicial reform, police power was on the march, particularly as it concerned crime. Just as the federal judiciary began upholding state-level police power in the name of social regulation, it was affirming state-level reductions in due process rights. *Palko v. Connecticut* upheld Connecticut’s law that allowed appeals from not guilty verdicts.<sup>1249</sup> In the judiciary, criminal justice cases tended to break in favor of police power. At the federal level, the new criminal code meant more prosecution, and defendants included liquor law violators, car thieves, narcotics addicts, counterfeiters, forgers, and postal violators.

American political culture had come to accept a robust role for government, including the federal government, in policing criminals. Indeed, members of the public often presumed a much more grandiose federal role than existed. Americans clamored for a Senate Subcommittee investigating crime to go beyond mere investigation. Believing “that the subcommittee was a kind of super-police” armed with prosecutorial power, Americans demanded “all types of investigations, into all kinds of wrongs,” ranging from “the internal affairs of municipalities” to “alleged unconscionable mortgage foreclosures.”<sup>1250</sup> The New Deal war on crime had pushed the boundaries of American acceptance of federal authority. Whereas the American Civil Liberties Union had looked upon the early New Deal with some apprehension about its threats to individual liberties, by the mid-1930s it held out some hope that the Roosevelt administration

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<sup>1246</sup> Frederick H. Stichfield, “The Supreme Court Issue,” *ABA Journal* 23, No. 4 (April 1937).

<sup>1247</sup> *Strauder v. West Virginia* 100 U.S. 303 (1880); *Bush v. Kentucky*, 107 U.S. 110 (1883); *Powell v. Alabama* (287 U.S. 45); *Brown v. Mississippi* (297 U.S. 278); *Wong Wing v. United States* (163 U.S. 228); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Whitney v. California* 274 U.S. 357 (1927); *Stromberg v. California* 283 U.S. 359 (1931); *De Jonge v. State of Oregon* 299 U.S. 353 (1937).

<sup>1248</sup> Memorandum Approving a Bill for Judicial Reform, 26 August 1937, in APPUCSB.

<sup>1249</sup> *Palko v. Connecticut*, 302 U. S. 319 (1937).

<sup>1250</sup> Crime and Criminal Practices, Senate Report 1189, August 9, 1937, 2.

would protect people from vigilante mobs and other forces of reaction, which now became its primary concerns.<sup>1251</sup>

A capacious interpretation of federal authority under the Commerce Clause perfectly accommodated the amplifying national crusade against crime.<sup>1252</sup> As J. Edgar Hoover argued, beginning with the White Slave Traffic Act of 1910, interstate commerce had justifiably accommodated a widening federal campaign against crime.<sup>1253</sup> Cummings broadened the expansive interpretation, a gift that kept on giving.<sup>1254</sup> Bank robberies dropped 37% in 1933 and kept falling in 1934 and 1935.<sup>1255</sup> As 1936 came to a close, Cummings recommended a slate of new federal laws. They included extending the Firearms Act to include pistols, revolvers, rifles, and shotguns; easing punishment for violations on the high seas; extending the National Stolen Property Act to include embezzlements and counterfeited securities; penalizing fake kidnappings; penalizing extortion letters sent to oneself; and criminalizing the receiving of trafficked women. On criminal procedure, Cummings wanted to give U.S. commissioners trial powers over petty offenses on Indian reservations, abolish appeals for interstate removal proceedings, allow commenting on the failure of the defendant to testify, make advance notice for alibi defenses, allow waivers of indictment by grand jury, allow spouses to testify, allow prosecutors to take deposition in criminal cases, confiscate felons' firearms, parole the mentally afflicted, and allow Circuit Courts of Appeal to revise sentences. He wanted U.S. Marshals to take disbursement duties from the Treasury and limit interest on claims against the government. War on crime federalism would make advances under his proposal to have federal courts inflict the death penalty in a means consistent with how it was done within the state. In December 1936 Roosevelt said Cummings's whole slate of recommendations "seem to me excellent."<sup>1256</sup>

Federal statutes in the late 1930s expanded federal police power dramatically in the name of fighting crime, with hardly a constitutional debate. By 1937, Congress was banning marijuana, something Narcotics Bureau chief Harry Anslinger did not think possible earlier in the decade. Prohibitionists saw international agreements as a way to circumvent constitutional objections to national restrictions.<sup>1257</sup> Anslinger had considered using the treaty power to circumvent normal constitutional restraints and regulate marijuana within America, as *Missouri v. Holland*, the migratory bird case, had carved out a treaty exception to the Article I, Section 8 limits on congressional authority. The Narcotics Bureau had recommended against a pair of bills in the Senate and House in 1935 to prohibit the transportation of marijuana via interstate and foreign commerce. Another idea involved regulating marijuana through taxation, as worked with the Harrison Narcotics Act, but one difficulty in this route was that drugs regulated by the 1914 law

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<sup>1251</sup> Paul L. Murphy, *The Constitution in Crisis Times, 1918–1969* (New York: Harper & Row, 1972), 170–171.

<sup>1252</sup> Edward S. Corwin summed up the New Deal liberals' attitude toward the predicament: "As the practical grounds for assertion by the National Government of its powers over interstate business operations have expanded, the theoretical basis in constitutional law and theory for such assertion has deteriorated; and for this somewhat paradoxical situation the Supreme Court is to an important extent responsible." Edward S. Corwin, *The Commerce Power versus States Rights* (Gloucester, MA: Peter Smith 1962 [1936]), 5.

<sup>1253</sup> J. Edgar Hoover, *Journal of Criminal Law and Criminology* (July–August 1933), 475.

<sup>1254</sup> Attorney General to President, 6 February 1935, OF10 Box 2: DOJ Jan–Feb 1935.

<sup>1255</sup> Justin Miller, "The Attorney General's Program for Crime Control," *ABA Journal* 21, No. 8 (August 1935).

<sup>1256</sup> Roosevelt to Cummings, 23 December 1936; Attorney General to President, 14 December 1936—both in OF10 Box 3: DOJ Apr–Dec 1936.

<sup>1257</sup> For much more on marijuana and Anslinger, see "Worse Than Murder," chapter 5 of this dissertation.

were exclusively imported, which was not the case with marijuana.<sup>1258</sup> By 1937, whereas federal prohibition of alcohol required a formal alteration of the national Constitution, federal prohibition of marijuana commenced after an unceremonious voice vote in Congress.<sup>1259</sup>

Having banned marijuana, the federal government pursued an expansion of national gun control. After the 1934 National Firearms Act used taxation power to effectively outlaw automatic weapons, the use of taxation and regulation to criminalize possession of contraband was a tested strategy, and in 1937 the Supreme Court upheld the Act in *Sonzinsky v. United States* against a criticism that it was a regulation in the guise of a tax measure. There were no dissents and the Court stressed the need for the judiciary to defer to the legislature.<sup>1260</sup>

War on crime federalism and firearms criminalization efforts reinforced each other. Beginning with New York's Sullivan Law in 1911, states had increasingly regulated firearms, but only New York required a license simply to own a handgun. Forty-five states had banned concealed carry of firearms or required licenses for lawful use, and twenty-two states adopted a scheme for licensing and taxing. Thirty states, twelve of which did not have the preceding type of restriction, required dealers to make and preserve detailed records of all sales of firearms.<sup>1261</sup> A national effort arose in the Uniform Firearms Act, which several states passed, and the Uniform Pistol Act, which restricted firearms but also encouraged target shooting and provided the National Rifle Association with a monopoly on firearms procurement. By 1938 some version of the Uniform law, endorsed by the ABA, was passed in thirteen states.<sup>1262</sup>

Cummings sought to go further than many of the states with a comprehensive registration scheme. The Attorney General compared America's much higher homicide rates, a larger fraction of them committed with firearms, to the rates in Canada's and England and Wales, and ventured to estimate how many handguns remained in American possession—whether it was “five million” or “ten million,” he believed “the number is large—too large.”<sup>1263</sup> John Dickinson

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<sup>1258</sup> Bonnie and Whitebread, *The Marijuana Conviction*, 118–22.

<sup>1259</sup> Bonnie and Whitebread sum up the connection to Roosevelt's style of governance in *The Marihuana Conviction: A History of Marijuana Prohibition in the United States*: “One primary interest was the question of federal responsibility. The New Deal Congress had been flexing its muscles for four years and resented any suggestion that any ‘national’ problem was beyond its competence. . . . The threat of invalidation by the Supreme Court posed the only restraint, and even that issue was rapidly becoming one only of form Bonnie and Whitebread, *Marihuana Conviction*, 154. Aside from having in common a broad governing philosophy and the specific constitutional theory, both the Marijuana Tax Act of 1937 and the Firearms Act of 1934 have since drawn criticism for standing in tension with some readings of the Fifth Amendment's self-incrimination clause. The marijuana tax act criminalized the failure to pay tax, punishable by both a prison sentence and a penalty tax. But complying with the tax required filing details with the Department of Treasury, including the name of the intend vendor. Because the fifty states criminalized marijuana sales, obtaining a tax stamp required admission to the intent to break state law. This eventually led to challenges in the courts based on self-incrimination. In *Leary v. United States*, the Fifth Circuit Court rejected the argument that the Fifth Amendment applied, after which the Supreme Court unanimously overturned the statute. See “The Marijuana Tax and the Privilege against Self-Incrimination,” *University of Pennsylvania Law Review*, Vol. 117, No. 3 (Jan. 1969); *Leary v. United States*, 395 U.S. 6 (1969).

<sup>1260</sup> “Courts may not inquire into the motives of Congress in exercising its powers; they will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution.” *Sonzinsky v. United States*, 300 U.S. 506, 507 (1937).

<sup>1261</sup> Frank R. Strong, *Cooperative Federalism*, 23 *Iowa L. Rev.* 459 (1938), 499–500.

<sup>1262</sup> Sam B. Warner, “Uniform Pistol Act,” 29 *American Institute of Criminal Law & Criminology* 529 (1938).

<sup>1263</sup> “Firearms and the Crime Problem,” Annual Convention of the International Association of Chiefs of Police, Baltimore, Maryland, 5 October 1937, in Swisher, *Selected Papers of Homer Cummings*, 83–84, 89.



credited technology for the decline of criminality and worried the trend was reversing itself. He believed that government employment of “firearms and artillery,” powerful against criminals but too expensive for them to buy, had suppressed crime “during the past two or three centuries,” but more “recent inventions have somewhat reversed these comparative advantages.”<sup>1264</sup>

At the same time, the Justice Department staked out a moderate position when compared to more radical proposals being floated. Justin Miller recognized Constitutional limits. After Joseph A. Farland suggested a heavily nationalistic program of crime-fighting, Justin Miller responded that the United States had no jurisdiction for most of his ideas, particularly on firearms. Regular searches of private property for firearms would violate the Fourth Amendment, and mass confiscation of firearms and ammunition would violate the Second Amendment. Although some registration and licensing might be possible if not for the “firearms manufacturers” and “rifle associations,” Miller believed that the 1934 Federal Firearms Act “goes about as far as the United States has jurisdiction to go under the Constitution.”<sup>1265</sup> Cummings’s professed goal in extending the regulatory power of the National Firearms Act to handguns, rifles, and shotguns was not to tax them nearly out of existence, as had been done with machine guns in 1934. Cummings told the president that the registration would be a means of regulation, not prohibition. It would be a “potent weapon against crime in the hands of law enforcement officers” but “cause no greater burden to the honest and law abiding citizen than the requirement of registration of automobiles.”<sup>1266</sup> A Justice Department press release gave the same impression of a law that would be maximally effective against criminals and barely inconvenient to the law-abiding: The National Firearms Act had already registered “18,000 machine guns and machine rifles, 16,000 sawed off firearms, [and] 700 rifles,” and although in ways “small weapons are even a greater menace than machine guns,” a mere one-dollar tax on transfers for handguns, rifles, and shotguns would impose “[n]o serious financial burden . . .” The “honest and law abiding citizen” would suffer “far less hardship by the proposed enactment than by the existing requirement that he register his automobile.”<sup>1267</sup>

Congress passed and Roosevelt signed the Federal Firearms Act of 1938, which restricted weapons transfers but fell short of Cummings’s original plan.<sup>1268</sup> The National Rifle Association supported the measure.<sup>1269</sup> Although the Supreme Court upheld the Firearms Act’s constitutionality as it concerned the Second Amendment in 1939, the Court in a 7–1 decision reversed parts of the National Firearms Act on Fifth Amendment grounds.<sup>1270</sup> By requiring registration, the Act compelled people to admit unlawful weapons possession, and by not registering they risked conviction for possessing an unregistered weapon.<sup>1271</sup>

On most issues, the federal government’s authority had advanced considerably. Its criminal code had expanded. Its prison system expanded through the inauguration of the national maximum-security prison and the birth of new bureaucracies like Federal Prison Industries. Its Bureau of

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<sup>1264</sup> John Dickinson, “Crime and the Constitution,” *ABA Journal* 21, No. 11 (November 1935), 739.

<sup>1265</sup> Miller to Farland, 28 February 1936; Farland to Miller, 27 February 1936.

<sup>1266</sup> Attorney General to President, 14 December 1936, OF10 Box 3: DOJ Apr–Dec 1936

<sup>1267</sup> Department of Justice for Release, 4 May 1937, OF10 Box 4: DOJ May–Aug 1937.

<sup>1268</sup> 52 Stat. 1250.

<sup>1269</sup> Carl Bakal, *The Right to Bear Arms* (New York: McGraw–Hill Book Company, 1966), 179.

<sup>1270</sup> *United States v. Miller*, 307 U.S. 174 (1939); 390 U.S. 85 (1968).

<sup>1271</sup> “Constitutional Limitations on Firearms Regulation,” *Duke Law Journal*, Vol. 1969, No. 4 (Aug., 1969), 773–801.

Investigation now had immense power, with very few detractors. Due process continued to suffer. H.R. 6178 abolished “appeals in habeas corpus proceedings brought to test the validity of orders of removal,” a victory for streamlined criminal procedure and war on crime federalism.<sup>1272</sup> At the same time, the federal judiciary’s increasing if uneven interest in state court proceedings appeared to provide long-term hope for enhancing state due process.<sup>1273</sup>

But the consensus began to falter under its own contradictions. One major area of disagreement regarding criminal procedure, federalism, and police power, which had raged for decades, was lynching. Since the late-nineteenth century, the practice of mob vengeance, almost entirely directed against African-Americans in the South, had been attributed in part to “a constantly growing distrust[] in the promptness and efficiency of the law” to punish the accused.<sup>1274</sup> From 1889 to 1932, there were a recorded 3,753 lynchings according to 1932 estimates, although current estimates are considerably higher.<sup>1275</sup> As of early 1934, Alabama, Indiana, Kansas, Kentucky, Virginia, and North Carolina had banned lynching as a specific crime.<sup>1276</sup> Many people from across the political spectrum wanted a federal lynch law.<sup>1277</sup> Old Right journalist H.L. Mencken published a satirical piece, “The New Deal Constitution” that focused almost entirely on economic questions but did have a brief, albeit ambiguous mention of “due process,” but even he believed the federal government ought to flex power to ban lynching.<sup>1278</sup>

Generally speaking, Cummings’s Justice Department provided some hope that it would vindicate the rights of African-Americans, but on lynching the Justice Department upheld a version of war on crime federalism that enabled Southern practices.<sup>1279</sup> Cummings confronted legal arguments on behalf of federal intervention against lynching. Some cited the Scottsboro

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<sup>1272</sup> Jerome Hall, Committee on Survey of Crime, Criminal Law and Criminal Procedure, 29 *American Institute of Criminal Law & Criminology* 562 (1938).

<sup>1273</sup> See “The Emergence of a Nationalized Bill of Rights: Due Process and a ‘Higher Law’ of Liberty,” *Brooklyn Law Review* 490 (1938).

<sup>1274</sup> James Harmon Chadbourn, relaying the determination of the 1893 Georgia Bar Association, in *Lynching and the Law* (Chapel Hill: University of North Carolina Press, 1933), 5.

<sup>1275</sup> Chadbourn, *Lynching and the Law*, ix. E.M Beck and Stewart E. Tonay have found that between 1877 and 1950 there were at least 800 more lynchings in twelve Southern states than previously documented. See *Lynching in America; Confronting the Legacy of Racial Terror*, Third Edition, Equal Justice Initiative (2017).

<sup>1276</sup> James H. Chadbourn, *Lynching and the Law* (Chapel Hill: The University of North Carolina Press, 1933).

<sup>1277</sup> On the progress toward reform see, for example, Christopher Waldrep, *African Americans Confront Lynching: Strategies of Resistance from the Civil War to the Civil Rights Era* (Lanham: Rowman & Littlefield, 2009).

<sup>1278</sup> H.L. Mencken, “A New Deal Constitution,” *The American Mercury* 41 (June 1937), 129–36; Mencken, “The Eastern Shore Kultur,” *Evening Sun* (1931).

<sup>1279</sup> Some people saw reason for hope. Americans petitioned Roosevelt’s federal government for help in overturning discriminatory laws preventing black people to go to the movie theater in Chester, Illinois. Respectfully referred to the Attorney General, 20 August 1933 Louis Howe, OF10 Box 1: DOJ June–August 1933. The Roosevelt administration did show some willingness to have African-Americans in the federal judiciary, such as James A. Cobb. Butcher and Harriet Shadd, 14 May 1934, OF10 Box 2: DOJ May–June 1934. They were especially open to the idea of African–American judges on an “experiment[al]” basis, such as in the Virgin Islands. Memorandum for Mr. Stanley Reed, 31 August 1935, OF10 Box 2: DOJ Mar–Aug 1935; Rep Arthur W—Illinois, 4 September 1935, OF10 Box 3: DOJ Sep–Dec 1935. Daniel Kato argues that judicial affirmation of federal non-intervention was a case of “constitutional anarchy.” See Kato, *Liberalizing Lynching: Building a New Racialized State* (Oxford University Press, 2015).

case in petitioning Cummings for federal action against lynching.<sup>1280</sup> Costigan asked if Cummings would appear before the Senate Committee on the lynch law.<sup>1281</sup> After the lynching of Elwood Higginbotham in Oxford, Mississippi, Walter White of the NAACP lobbied the president for federal intervention. Roosevelt was sympathetic to White's position but consulted Cummings.<sup>1282</sup> The NAACP looked to an interstate lynching of Claude Neale, taken from Alabama to Florida in October 26, 1934, as a perfect candidate for the Roosevelt administration to pursue under the federal kidnapping laws. The Supreme Court gave validation to a liberal reading in *Arthur Gooch v. United States*, reading the Federal Kidnapping Act broadly so as to include "material benefit" other than "ransom or reward." In reference to the "still broader construction of the statute urged in some quarters" to include "interstate abductions for the purpose of murder"—almost surely lynching—Cummings interpreted the Court's opinion to mean that it "does not appear to go that far."<sup>1283</sup> Walter White protested that the kidnap and murder of a law enforcer triggered the Lindbergh law, asking why interstate lynching failed to qualify. "Are officers of the law offered the protection of the Department of Justice while private citizens are denied this protection?" White asked Cummings. "Neal was colored—Turnbell was white. Are white citizens offered the protection of the Department of Justice while Negroes are denied this protection?" Cummings cited the *Gooch* case, which White said, if taken broadly, should allow for prosecution of both the Burnette and Neal murderers. If taken narrowly, it didn't apply to either, White reasoned. "In other words, the Department of Justice protects white persons who escape a murderous assault while it ignores a Negro citizen who is killed."<sup>1284</sup>

But African-Americans and opponents of lynching did have reason to hope that the New Deal federal government would finally affirm civil rights against local abuse. In the fall of 1936 in the Eastern District of Arkansas, peace officer Paul Peacher faced charges for violating section 443, title 18 of the US Code, a statute against slavery, by abusing the peonage system. He had convinced the mayor that eight black Americans were vagrants and that he had a convict leasing arrangement with the county. Although at least some of them were clearly not vagrants, at least one owned his own home, and Peacher had no such convict-lease arrangement, for 20 days they labored on his leased land. The Justice Department met with sympathetic locals, including a socialist candidate for governor and officials and lawyers from the Southern Tenant Farmers Union.<sup>1285</sup> Although Brian McMahon expressed some concern that the union was opportunistically raising money on the scandal, it was overall a striking confluence of interests between organized labor, civil rights activists, and the federal government.<sup>1286</sup> The indictment was unanimous but Peacher enjoyed local support in the courtroom.<sup>1287</sup> The victims testified to being beaten and deprived food for days.<sup>1288</sup> Under pressure from the judge, an initially deadlocked jury convicted Peacher on all charges, and he was sentenced to prison time,

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<sup>1280</sup> To Attorney General, February 1935, OF10 Box 3: DOJA Jan–Feb 1935.

<sup>1281</sup> Memorandum for the Attorney General, 28 February 1935, OF10 Box 3: DOJA Jan–Feb 1935.

<sup>1282</sup> Attorney General, 13 March 1935, OF10 Box 3: DOJA March–May 1935.

<sup>1283</sup> Attorney General to President, 3 February 1936, OF10 Box 3: DOJ Jan–March 1936.

<sup>1284</sup> White to Cummings, 16 December 1936; White to Cummings, 24 December 1936—both in PHSC Box 135: NAACP.

<sup>1285</sup> Gordon Dean, Memorandum for the Attorney General, 1 October 1936, PHSC Box 75.

<sup>1286</sup> Memorandum for Attorney General, 17 November 1936, PHSC Box 75.

<sup>1287</sup> Brian McMahon, Memorandum for the Attorney General, 24 November 1936, PHSC Box 75.

<sup>1288</sup> Sara Anita Downer, "Guilty Arkansas Peonage Planter Seeks New Trial: Probation is Offered," *The Chicago Defender* (National edition) (1921–1967); 5 December 1936.

deferrable if he opted to pay a \$3,500 fine. The Farmers Union took credit for putting pressure on Roosevelt in an election year.<sup>1289</sup> Cummings hailed the conviction as a “distinct victory for law and order.”<sup>1290</sup> The *Chicago Defender* declared it a “complete victory for the Race.”<sup>1291</sup> The *Little Rock Gazette* ominously wondered what “would have happened if the federal government had not gone in?” The *Afro-American* noted the politically expedient timing but called the conviction a “feather in the cap of slow-going” Cummings, who had failed to enforce kidnapping statutes against lynchings but had now perhaps “awakened from his slumber.” With a federal lynch law, the paper hopefully predicted that the “Federal government could wipe out lynching in one year.”<sup>1292</sup> Under Roosevelt, the party of the Southern Confederacy was finally steering the national government toward fulfilling the promises of Reconstruction.

On the other hand, Jim Crow Democrats continued to have reason to hope that the New Deal state’s war on crime federalism would leave the South’s lingering peculiar institutions intact. The controversy over lynching swelled in August 1937, when Roosevelt announced his first nominee for the Supreme Court to fill the seat of retiring conservative justice Van Devanter. Alabama Senator Hugo Black was a loyal Roosevelt partisan who strongly opposed the legal conservatives’ obstruction of social legislation and had used his Senatorial power to investigate critics of the New Deal.<sup>1293</sup> He was also a former member of the KKK, an organization that helped propel him to the Senate. Black had since disassociated himself from the Klan, but he helped lead the filibuster of the federal lynch law in May 1935.<sup>1294</sup> Many articles in the mainstream press criticized the nomination. The *New York Amsterdam News* ran an editorial condemning Black’s record on African-Americans as well as his willingness to confiscate property “without ever dreaming of ‘due process of law.’”<sup>1295</sup> The African-American *Chicago Defender* condemned the elevation of this “arch-enemy of our race.”<sup>1296</sup> The United Colored War Veterans protested the appointment.<sup>1297</sup> The Senate confirmed his nomination with only sixteen against.<sup>1298</sup> Some noted that his selection seemed to turn on politics rather than judicial experience. The Justice Department responded the furor with a press release, insisting that Black’s “record of public service and election on two occasions by the State of Alabama as United States Senator made his suitability beyond question.”<sup>1299</sup>

The next year the federal lynch law continued to divide New Deal Democrats. Theodore Bilbo, a loyal New Dealer from Mississippi, led the 1938 filibuster against the Costigan-Wagner anti-lynching bill, declaring that such a law would “open the floodgates of hell in the South. Raping, mobbing, lynching, race riots, and crime will be increased a thousandfold” and the land

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<sup>1289</sup> “Slavery Verdict Won by ‘G’ Men,” *New York Times*, 29 November 1936.

<sup>1290</sup> *New York Times*, 27 November 1936.

<sup>1291</sup> Sara Anita Downer, “Guilty Arkansas Peonage Planter Seeks New Trial: Probation is Offered,” *The Chicago Defender (National edition)* (1921–1967); 5 December 1936.

<sup>1292</sup> “Mr. Cummings Wakes Up,” *Afro-American*; 12 December 1936.

<sup>1293</sup> David T. Beito, “New Deal Mass Surveillance: The ‘Black Inquisition Committee,’ 1935–1936,” *Journal of Policy History* 30, No. 2 (2018).

<sup>1294</sup> “Anti-Lynch Act Shelved by Filibuster,” *Pittsburgh Post-Gazette*, 2 May 1935.

<sup>1295</sup> “Opposed to Black,” *New York Amsterdam News*, 21 August 1937.

<sup>1296</sup> “Sen Black is ‘Black Eye’ to Hope in Race: F. D. R. Elevates Former Police Court Judge To Highest Tribunal,” *Chicago Defender*, 21 August 1937.

<sup>1297</sup> United War Veterans Protest Against Black, 9 October 1937, *Chicago Defender*.

<sup>1298</sup> “Black Voted to Supreme Court Despite Klan Charge,” *Washington Post*, 18 August 1937.

<sup>1299</sup> For Immediate Release, Department of Justice, 13 September 1937, OF10 Box 4: DOJ Sept–Dec 1937.

would be flooded by “the blood of the raped and outraged daughters of Dixie” as well as the blood of the black perpetrators inevitably brought to justice. Under war on crime federalism, the states had their own leeway in disciplining the population, including by lynching, even if it meant restraining the federal police power.

Aside from lynching, other dissent from the consensus targeted the dangerous mix of New Deal judicial philosophy and crime, particularly as it concerned the administrative state and criminal procedure. Administrative law could, Charles Wyzanski hoped, “satisfy the constitutional mandate of ‘due process of law.’” The challenge was the “unworthy criticism” of kneejerk anti-regulation people.<sup>1300</sup> Indeed, some voiced concerns about the impact of the New Deal regulatory regime. The Law Institute had considered the impact of bureaucracy on criminalization. The regulatory state was intruding into “an infinite number” of areas, each time “imposing restrictions, obligations and duties, many of which are enforceable by criminal penalties.” Cummings’s fixation on administrative law continued to have a criminal component. He agreed with Carl McFarland that the academy had undertheorized administrative law. At issue here was the police power, the power of government to advance regulation and welfare as well as pursue criminals. McFarland, like Cummings, was no idealist. He believed that “No law and no procedural system can eliminate the improper use of the vast power of the state. . . . No statute, for example, can prevent the simultaneous and oppressive use of tax investigators, securities investigators, anti-trust investigators, postal inspectors, and others against a single disfavored person, or corporation, or industry, or class—or the threat of ruinous criminal proceedings or civil actions under strained interpretations of law and evidence—if depraved or ignorant or misguided officers (or judges for that matter) are so minded. . . . Such a possibility, however, exists under and form or structure of government. That problem is not one of laws but of men.”<sup>1301</sup> Whereas on issues of criminal law the administration enjoyed wide support, questions of criminalization that most closely intersected with the New Deal were more controversial.

Another source of mounting dissent was criminal procedure. One major study questioned the dominant assumptions about criminal procedure—that it had failed to reform and was delaying justice. Responding to Piere Crabites, Pendleton Howard identified what became the dominant view, that a “failure to ‘adapt’” old common law procedures was resulting in “interminable delays and continuances,” and slow grand jury, trial, and appeals processes. It was fashionable to criticize criminal procedure’s saturation with technicalities and to call for simplification, ignoring the “baffling complexity of the problem of crime.” Howard believed that blaming “antiquated judicial machinery” was tenable, that in fact under Roosevelt there was “more wholesale and constant tinkering” of criminal law and criminal procedure than ever before, and crime commissions and debates had already gutted appeals and undercut the “sanctity of [the] jury.”<sup>1302</sup> One critique of Supreme Court rulemaking stressed the due process rights of defendants, which must allow for speedy prosecution of the guilty while protecting the “multitude of uncounseled ‘little people’” and minimize the “risk of hasty conviction of the innocent. For many defendants, criminal justice is already too speedy.”<sup>1303</sup> Osmond K. Fraenkel

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<sup>1300</sup> Wyzanski to Cummings, 29 September 1938, PHSC Box 69, folder 1.

<sup>1301</sup> McFarland, “Administrative Law—Its Symptoms and Diagnosis,” Georgia Bar Association Address, 25 May, 1939, PHSC Box 69, folder 1.

<sup>1302</sup> Pendleton Howard, “American Criminal Justice and the Rules of the Game,” *ABA Journal* 24, No. 5, May 1938.

<sup>1303</sup> Reform in Criminal Procedure, 50 *Yale Law Journal* 107 (1940), 108.

gave a prescient warning that liberals' attitudes about the judiciary were shortsighted. Although some reform was necessary, liberals were "naïve" in thinking that the abolition of judicial review will permit the forward march toward the desired goal." On balance, "without such power repressive and arbitrary acts of government would be much freer from correction. For it is in the field of minority rights, of civil liberties, that constitutional restraints have their greatest significance and judicial review its real value."<sup>1304</sup> By 1940 a major criminological journal warned that weakened due process protections had proven a minor nuisance to serious criminals but a grave danger to "Youthful, inexperienced, and oftentimes doubtful offenders."<sup>1305</sup>

Most famously, Roscoe Pound, the founding father of legal realism, a progressive-era understanding of the law in functionalist terms, worried that the New Deal had gone too far in modernizing the law.<sup>1306</sup> At first, Pound had taken a middle-of-the-road position on criminal procedure, not dissimilar to that taken by such New Dealers as Justin Miller. In 1934 Pound strongly opposed third-degree interrogations but also supported stripping defendants of the Fifth Amendment immunity on testimony that barred prosecutors from making comment about defendants' failure to testify. Eager about progress, Pound believed that "this immunity ceased to have any basis in the seventeenth century" and no longer had much "use to the innocent."<sup>1307</sup> By 1936, he responded to the pervasive "decrying of the bill of rights" with a warning that in the future the "call for these limitations" would grow louder. At first, Pound recognized that the criminal law needed to change in light of the "administrative side of punitive justice," and that the laws needed to govern such administrative law.<sup>1308</sup> With Cummings, Pound also agreed on the importance of harmonizing the law across America for the purpose of the national welfare state.<sup>1309</sup> But by 1939, Pound worried that the administrative state would make a mess of criminal procedure. He insisted that the arguments for common law rule-making in civil procedure applied to criminal procedure. The common law had produced the rules, which were appropriately in flux. He argued that such an approach would be more adaptive, that judges would be more sympathetic to the approach, that the bar can be consulted, that courts recognize the problem as a whole, that legislatures are uninterested in small details and procedural changes, and courts could move more quickly. In response to the criticism that trusting the courts would "bear too hard upon accused persons," Pound noted that criminal procedure amendments had historically come from the Department of Justice, a "great prosecuting bureau" with its own agenda. He believed criminal law needed more treatises and more scholarly attention to withstand the mechanical anti-intellectualism of the rising administrative state he had spent his career championing.<sup>1310</sup>

Despite such dissent, the institutional legacies of the war on crime consensus abounded in Cummings's last two years as Attorney General. An expansive war on crime and judicial reform

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<sup>1304</sup> Osmond K. Fraenkel, Constitutional Issues in the Supreme Court 1936 Term, 86 *University of Pennsylvania Law Review*. 38 (1937–1938)

<sup>1305</sup> William A. Dunn, *Journal of Criminal Law and Criminology* 30, No. 6 (Mar. – Apr., 1940), 894.

<sup>1306</sup> See Joseph Postell, "The Anti-New Deal Progressive: Roscoe Pound's Alternative Administrative State," *The Review of Politics*, Vol. 74, No. 1 (Winter 2012), 53–85.

<sup>1307</sup> Roscoe Pound, "Legal Interrogation of Persons Accused or Suspected of Crime," 24 *American Institute of Criminal Law & Criminology* 1014 (1934), 1015.

<sup>1308</sup> Roscoe Pound, "Toward a Better Criminal Law," *ABA Journal* 21, No. 8, August 1935, 499–500.

<sup>1309</sup> Roscoe Pound, "Unification of Law," *ABA Journal* 20, No. 11, November 1934, 696.

<sup>1310</sup> Roscoe Pound, "Practical Advantages of Rules of Court for Criminal Procedure," *ABA Journal* 25, No. 10, October 1939, 825.

continued to advance together in mutually reinforcing steps. Past successes at reform served to rationalize even more. Cummings cited the overworked federal courts, clogged with “fifty thousand undisposed of cases,” as a reason for judicial reform.<sup>1311</sup> The Attorney General’s records showed that of the 56,332 total cases in the U.S. district courts on July 1, 1936, 10,993 were criminal. Of the 51,629 total cases in June 30, 1937, 11,011 were criminal.<sup>1312</sup> In 1938 Cummings urged a renewal of his criminal procedure reforms. He sought to permit defendants to waive indictment by grand jury and “to consent to prosecution by information.” He wanted alibi defenses announced in advance. He hoped to free prosecutors to comment on defendants’ failures to testify. He aimed to extend the Criminal Appeals Act to afford more appeals by the government.<sup>1313</sup> He encouraged Roosevelt in December 1938 to share a letter with Congress that took credit for “Great steps forward. . . in judicial reform to the end that our courts may function with greater celerity and efficiency.” Cummings emphasized, as he had in the past, that “there is a need for procedural reform” in administrative law. Such reform would allow for “efficient and flexibility instrumentality.” He allowed for space for “protection of substantive rights and adequate, but not extravagant, judicial review.” The District Courts had already enjoyed a broad “reform of civil procedure” that could now be brought to “the several Circuit Courts of Appeals.”<sup>1314</sup> Under new president Arthur T. Vanderbilt, the ABA was fully behind Cummings on the new court rules, the bill for additional judges, and the creation of an administrative office for the federal judiciary.<sup>1315</sup>

Cummings ended his career as Attorney General enjoying wide recognition for his work on criminal procedure, war on crime federalism, and the crusade against lawbreakers. Roosevelt thanked him on his way out on New Year’s eve for guiding the “Department through a difficult period” and “suggesting legislation.” Because of Cummings, “the homes of America are safer[,] . . . interstate crime has been checked[,] . . . great strides have been made in improving judicial procedure.”<sup>1316</sup> As Cummings’s career ended, his relationship with the ABA had warmed. He thanked Ransom for the journal’s kind words about him in December 1938.<sup>1317</sup> He thanked others as well.<sup>1318</sup> ABA President Frank Hogan was disappointed that Cummings planned to retire, saying that despite any disagreements under his leadership the Justice Department showed great “ability and impartiality” and a “high degree of efficiency.”<sup>1319</sup> Perhaps most telling was the official press release announcing Cummings’s retirement. It credited him for expanding the FBI, creating the National Police Academy, modernizing the prison system, and enhancing the Attorney General’s power in litigation, in producing the omnibus judges bill, and in many other

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<sup>1311</sup> Homer S. Cummings, *Modernizing Federal Procedure*, *ABA Journal* 24, No. 8, August 1938.

<sup>1312</sup> A Table Showing Total Number of Cases Pending in the United States District Courts, PHSC Box 69 Folder 4. Statement on S3233.

<sup>1313</sup> Criminal Rule Making, Statement and Recommendations of Honorable Homer Cummings, Annual Report of the Attorney General for the Fiscal Year 1938, PHSC Box 114: misc.

<sup>1314</sup> Cummings to Roosevelt, 14 and 17 December, 1938, PHSC 69: Folder 1.

<sup>1315</sup> Attorney General to President, 17 April 1938, OF10 Box 4: DOJ Jan to April 1938.

<sup>1316</sup> As he put it, “you have carried your Department through a difficult period. . . suggesting legislation. . . As a result the homes of America are safer. As a result interstate crime has been checked. As a result great strides have been made in improving judicial procedure.” Roosevelt to Cummings, 31 December 1938, OF10 Box 5: DOJ Sept to Dec 1938.

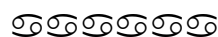
<sup>1317</sup> Cummings to Ransom, 17 December 1938, PHSC Box 71: ABA.

<sup>1318</sup> Cummings to Joseph J. Cotter, 17 December 1938, PHSC Box 71: ABA.

<sup>1319</sup> Frank Hogan to Cummings, 24 November 1938, PHSC Box 71: ABA.

areas. It praised Cummings in particular for adjusting federalism regarding criminal law. When he took office, the states were often “without facilities or power to reach interstate criminals who operated in what Attorney General Cummings terms ‘No Man’s Land’ between state and federal jurisdiction.” Thanks to the twenty laws passed in 1934, efforts on criminal procedure, on criminal law America enjoyed the most “far reaching reforms since 1789.” As the release emphasized, none of Cummings’s laws were “held invalid by any court.”<sup>1320</sup> Before it began to unravel, the constitutional consensus, mobilized by Cummings, had sustained an escalating war on crime long enough to leave behind permanent institutional changes.

Cummings’s push for reforming criminal procedure persisted after retirement and ended anti-climactically. Although many of his plans to streamline due process never materialized, he had more luck with the centralization of procedural rules. Cummings lamented that criminal procedure reform was lagging behind civil procedure. The Supreme Court’s rule-making power extended to equity, admiralty, bankruptcy and copyright, and since 1935, criminal cases after verdict. But the Court still needed an expedited criminal procedure, from arrest to verdict, to “speed and simplify the administration of justice.” Cummings cited the June 1934 Act authorizing Supreme Court rules of pleading, practice, and procedure.<sup>1321</sup> His collaborator Alexander Holtzoff, still in the Department of Justice, lamented that criminal cases were “covered by a strange admixture of federal statutes, state statutes and rules of common law.” Volumes on criminal procedure were being sold, but there was no “complete body of procedural rules.” It was up to the federal legislature to bring about improvement.<sup>1322</sup> In his 1939 correspondence with Holtzoff, Cummings stressed the urgency of reforming rule-making, which was being held about because a key Congressman was sick. Cummings could not bear to wait for the next term to pass his reform. “The danger lies in delay,” he wrote. “Our greatest enemy is inertia.”<sup>1323</sup> He pestered the sick Congressman to write a letter encouraging the passage.<sup>1324</sup> Eventually the bill passed, and Cummings was gifted the pen Roosevelt used to sign the bill. In the long term the Supreme Court would sometimes use this power in favor of defendants, at other times to ease the job of prosecutors. Having done so much to shape due process, federalism, and police power in the 1930s, Cummings left it to future generations to determine the legal boundaries of criminal justice.



Amidst the 1937 clash over the Supreme Court, liberals and conservatives were coming together on important matters of constitutional interpretation. Arguing for more reform of federal procedure in 1938, Cummings hailed law as a “living, breathing, vital thing, and not merely a rule of conduct.”<sup>1325</sup> Cummings’s living constitutionalism indeed differentiated himself from conservative legal thought, but at the same time he downplayed the convergence that had come

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<sup>1320</sup> For Immediate Release, 15 November 1938, OF10 Box 5: DOJ Sept to Dec 1938.

<sup>1321</sup> Cummings to Vanderbilt, 8 July 1939, PHSC Box 114.

<sup>1322</sup> Holtzoff to Cummings, 5 May 1939, PHSC Box 114.

<sup>1323</sup> Cummings to Holtzoff, 20 June 1939, PHSC Box 114.

<sup>1324</sup> To Summers, 22 June 1939, HCUVA Box 114.

<sup>1325</sup> Homer S. Cummings, “Modernizing Federal Procedure,” *ABA Journal* 24, No. 8, August 1938.



by the late 1930s. Liberals had opposed the court-packing scheme and conservatives were coming around to aspects of social legislation.

The convergence was most stark on issues of crime and punishment. Different rationales served to bridge the gap. Arguing from different premises, liberals and conservatives came together on criminal procedure, on a federalism that accommodated both federal and state wars on crime, and, by the late 1930s, a more expansive view of police powers than either side had advocated earlier in the decade. Indeed, identifying the constitutional consensus on crime came relatively early, and helped drive the 1930s agenda.

In considering the American reliance on criminalization, the emphasis on robust prosecution, the support for federal and state powers mostly cooperating against crime, the belief that almost anything could be subject to criminal penalty, many scholars are struck by the consensus between liberals and conservatives, whether in the 1990s, 1960s, or 1940s.<sup>1326</sup> In fact, the consensus was as primordial as New Deal liberalism and anti-New Deal conservatism and has served both sides since their inception in a dialectical competition over unleashing the state against criminals. This legal consensus was constitutive of the construction of New Deal liberalism. As the nation looked abroad in preparation of another major war, liberals' own conception of law as a flexible, living institution—as Cummings defended it—prepared them for their support of the security state, and it would signal the final resolution of interwar America's great political contradictions.

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<sup>1326</sup> On liberal Democrats' tough-on-crime posture under Clinton in the 1990s, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010). On liberal Democrats' tough-on-crime posture under Johnson see Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (Cambridge, MA: Harvard University Press, 2016). On liberal Democrats' tough-on-crime posture in the postwar context see Naomi Murakawa, *The First Civil Right: How Liberals Built Prison America* (Oxford and New York: Oxford University Press, 2014).

## Chapter 7

### *The Liberal Security State*

On September 19, 1938, as Hitler prepared to seize the Sudetenland, J. Edgar Hoover warned of an urgent national security threat at home. While “presumably at peace” America was in fact already at war. This “domestic war” pit “the forces of law and order against a subversive enemy.” Crime. Hoover was speaking before members of the American Legion, a civic veterans group founded in 1919, and appealed to their sense of patriotism in identifying criminals as a warlike threat. He urged the Legion to join the “orderly forces of Government” in guarding civilization. He estimated 4.6 million criminals in America. This “army of lawlessness,” the “Huns and Vandals of the modern” day, were inflicting a “record of carnage that could scarcely be equaled by the invasion of this country by a foreign foe.” In addition to common lawbreakers who brought “suffering and death into the homes of all classes of our citizens,” the threat had a cultural dimension. Public corruption, “demoralized law enforcement agencies,” and “venal politics” now clasped the “blood-caked hand of crime.” Amidst all this, the United States also faced an ideological threat—communism and fascism—“the antithesis of American belief in liberty and democracy.” To defend democracy, all the forces of good had to mobilize in a “crusade” for “true Americanism.”<sup>1327</sup>

This speech, “Soldiers in Peacetime,” captured not only Hoover’s posture toward crime and subversion, and the relationship between them, but also the national moment’s uneasy mix of war fatigue and war preparation. Because his audience recalled the “horrors” of conflict, Hoover trusted them to know how to “campaign for peace, without undermining our National Defense.”<sup>1328</sup> This pacifist militarism was the defining paradox of the interwar period. It applied far beyond anything Hoover meant. The country itself was shell-shocked from two decades of turmoil—from the Red Scare, the repression of immigrants and dissidents, the civil wars against liquor and crime, the emergency powers of New Deal regulation, popular upheavals and assassination attempts, temptations of extremism and anxieties about liberal capitalism. All of these anxieties were “rooted in the Great War,” a phrase Hoover used to describe the American Legion but which extended to America’s many interwar troubles. These troubles, rooted in war, nonetheless directed inward, as the peacetime United States, divided against itself, sought political legitimacy. And yet by the close of the 1930s faction and dissent gave way to consensus. Even ACLU founder Roger Baldwin, unimpressed by the New Deal and dreading war and suppression, finally warmed up to Roosevelt’s liberalism at the very moment when these threats became most palpable. By 1941, Roosevelt and his Republican detractors, radical activists and J. Edgar Hoover—adversaries since World War I—united behind a new kind of security state on behalf of the 120 million “true” Americans who opposed communism, fascism, and criminality. The new unity was more inclusive and yet more vigilant than ever before. More Americans than ever could share in a new vigilant and uncompromising solidarity against lawless and foreign threats to the liberal order. This solidarity, ideologically and institutionally forged in the New Deal war on crime, drove the effective transformation of the war on crime

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<sup>1327</sup> J. Edgar Hoover, “Soldiers in Peacetime,” 19 September 1938, delivered at National Commanders Banquet, 20<sup>th</sup> Annual National Convention of the American Legion,” OF10b: DOJ FBI, 1937–1938.

<sup>1328</sup> Hoover, “Soldiers in Peacetime.”

coalition into a security-state coalition, and guided Americans as they confronted the Axis Powers.<sup>1329</sup>

Historians tend to describe Rooseveltian liberalism as a historical construction rather than a reductively definable philosophy, a program shaped by the governing experimentation and strategic realism necessitated to ameliorate the Depression and mobilize wartime America. But if policy conditions acclimated liberalism to bureaucratic administration, executive planning, and coercive nationalism, crime and punishment are curious factors to overlook. General histories of the New Deal mostly neglect the FBI's modernization throughout the 1930s. Those sensitive to this history have stopped short of a cohesive account of crime-fighting, national-security, and liberalism as a state-building program. Historians focused on state coercion have convincingly described World War II's transformative impact on liberalism and the security state. They have identified wartime liberalism as more pragmatic than earlier varieties, more accommodating of industrial capitalism, global power, national security, or national enforcement of civil rights. Yet the criminological roots of modern pragmatic liberalism remain elusive, despite the profound implications for postwar legal and carceral liberalism.<sup>1330</sup> Indeed, the New Deal liberals' experimentation with fighting crime provided the bridge between the welfare state and the peacetime and wartime security state. Crime fighting innovations persuaded liberals of a new equilibrium between expansive national and local power, a balance between state violence and political legitimacy.<sup>1331</sup> Explaining the rise of the modern security state in the last years of peace requires an appreciation of the institutional and ideological transformations driven by criminal enforcement.

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<sup>1329</sup> On the Great War origins of the New Deal emergency state, see William E. Leuchtenburg, "The New Deal and the Analogue of War," in John Braeman, *Change and Continuity in Twentieth-Century America* (Columbus: Ohio State University Press, 1968), 81–143.

<sup>1330</sup> World War II's transformative political impact on the United States is widely recognized, although often historians seek to distinguish the welfare state from the security state in this development. See James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2013) and Carl Boggs, *Origins of the Warfare State: World War II and the Transformation of American Politics* (New York and London: Routledge, 2017). Also see "Trial by Fire," chapter 8 of this dissertation, for more discussion of the literature and themes pertaining to different types of government growth in World War II.

<sup>1331</sup> When considering the transformation of liberalism through the experiences of the New Deal through World War II, scholars often emphasize the coercive dimension of political economy but curiously overlook the criminal justice state's central role in the integration of economy, war, and liberalism. Historical sociologist Jason Scott Smith provides an important study of liberalism as an ideological project unfolding through policy experimentation, even exploring the connection between welfare and carceral power in the WPA's construction of internment camps, in *Building New Deal Liberalism: The Political Economy of Public Works, 1933–1956* (Cambridge and New York: Cambridge University Press, 2005). In considering why the postwar liberalism diverged "from the ideas that had characterized much of the New Deal itself," Alan Brinkley looks to the shift from New Deal fiscal philosophy to the quasi-Keynesian wartime emphasis on consumption in *The End of Reform: New Deal Liberalism in Recession and War* (New York: Vintage Books, 1996 [1995]), 14. Without stressing "liberalism" as such, Lizabeth Cohen nevertheless concurs with Brinkley's emphasis on the shifting ethos of political economy from the New Deal to World War II in *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Vintage Books, 2003), ch. 1 and 2. For older critical accounts of the transformative effect of the New Deal and Second World War on American liberalism see economic historian Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: Oxford University Press, 1997); and Arthur A. Ekirch, *The Decline of American Liberalism* (New York: Longmans, Green, 1955), which discusses crime in the context of prohibition but not in relation to the Roosevelt administration.

Focusing on the New Deal war on crime complicates the teleological account of domestic war preparation in the immediate years before Pearl Harbor. Instead of looking backward at the 1930s security and surveillance state through the retrospective lenses of World War II or even the Cold War, historians should consider the peacetime consolidation of coercive infrastructure as a contingent, essentially political development. In addition to the state building outlined in the previous chapters, several more components contributed to this infrastructure. First, the perceived successes of the war on crime consummated a bipartisan liberal consensus in both federal and state electoral politics. Second, the FBI integrated domestic policing and political surveillance, a process that recast Rooseveltian liberalism as the muscular protection of American values. Finally, the last three years before war completed the institutional and ideological production of the liberal security state, reinforced by new developments in federalism and with the New Deal's critics on both left and right assimilated into a patriotic security-state liberalism. By 1941, the war on crime produced and legitimated an immense and intricate enforcement and intelligence leviathan, boasting both unprecedented power and a deference to law and liberty, which World War II would test and solidify rather than create.

### The New Politics of Repression

The New Dealers and war on crime coalition had an easy relationship with the very concept of *repression*. Memories of the lawless repression of World War I and Red Scare haunted both radicals and liberals among the New Deal coalition. The progressive wing of New Deal criminology emphasized the need to go beyond “mere repression” in cutting off criminality at the source—identifying and addressing the socio-economic reasons for social dysfunction. But they almost all also embraced the power of the state to forcefully subdue criminals. In anticipating another national emergency, they feared the lawlessness of repression more than the coercive power of the state itself.

By 1936 the New Deal law and order vision had become America's. Having adopted the fight against gangsters at the end of prohibition, Roosevelt and Cummings's war on crime coalition had united academic criminologists, G-Men, social workers, 1920s Republican holdovers and New Deal Democrats behind an agenda of comprehensive crime suppression. This program meant expanded law enforcement activity at all levels of government, the participation of every facet of civil society, a heavy reliance on criminalization, policing, and prisons, scientific forensic and professional training.

In party politics, not just federal but state politicians coalesced around an energetic and distinctly liberal approach to combatting criminality. The broad support for a crackdown in the late 1930s arose despite plummeting crime. Having peaked in the early 1930s, American homicide rates dropped every year in the second half of the decade—from just over 8 killings out of every 100,000 people down to just over 6 out of every 100,000 in 1940.<sup>1332</sup> The instruments of local repression—policing and incarceration—swelled as politicians in both parties competed with one another to wage war on falling crime. As Roosevelt's increasingly controversial domestic ambitions irritated even his partisan allies, the mainstream agreement over crime and punishment generally transcended party lines. While radical dissent targeted the coercive

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<sup>1332</sup> Barry Latzer, *The Rise and Fall of Violent Crime in America* (New York: Encounter Books, 19).

implements of the New Deal state, it rarely centered on crime and punishment, a matter on which electoral politics consolidated in a liberal consensus.

Roosevelt first gained executive experience combatting crime when he served as governor of New York, and his successor carried his legacies forward. New York saw one of the most ambitious state-level wars on crime, which Roosevelt identified for its progressive approach. Herbert Lehman had been Roosevelt's Lieutenant Governor during the prison strikes of the late 1920s, had advocated a comprehensive response of crime prevention, reform in the treatment of prisoners, rehabilitation and parole, and advised Roosevelt on appointments for New York's Prison Commission and Legal Commission in 1930.<sup>1333</sup> This experience guided him as governor. In 1935 Lehman hosted an ambitious conference called "Crime, the Criminal and Society."<sup>1334</sup> The event showcased all manner of reform proposals, from the governor's idea of universal fingerprinting to Republican former U.S. Attorney George Medalie's proposal that Attorneys General be appointed rather than elected.<sup>1335</sup> The *Times* referred to Lehman's "war on crime," pointing to his sixty-point law-and-order program, which included the creation of a state-level Department of Justice modeled after Washington DC's.<sup>1336</sup> Reporting on Thomas E. Dewey, Lehman's special prosecutor who stressed tight coordination with police, assistance from Washington, and secrecy, the *Times* described the atmosphere as "the beginning of a war."<sup>1337</sup> Elsewhere in the press, particularly in editorial cartoons, Lehman was tightly associated with this war against street crime (see Figure 7.1).

The 1936 election season demonstrated the non-partisan popularity of this war. Like Roosevelt, Lehman won reelection touting success of his crime policies. But these New York Democratic crime warriors had suffered one important defection—Raymond Moley. The speechwriter for Democratic politicians in the Empire State, architect of Roosevelt's Brain Trust who coined the term "the Forgotten Man," and Columbia law professor who led an extensive survey of criminal justice for the U.S. Justice Department in 1933 and 1934, turned against the constitutional experimentation under the New Deal and backed Alf Landon against Roosevelt in November. But throughout 1936 and the rest of the decade, Moley showed a continuing pride in the administration's work with crime.<sup>1338</sup> He hailed Cummings in May for his "courageous backing of Hoover" against his detractors and for championing FBI professionalization.<sup>1339</sup> In June he told Cummings that his shielding "the Federal instrumentalities for criminal justice against politics and inefficiency" was among "the high spots of this Administration." Cummings deserved thanks for having backed and "intelligently interpreted the work" of "two national leaders," J. Edgar Hoover and Prison Bureau director Sanford Bates.<sup>1340</sup> In other words, Moley could switch parties without abandoning his precious war on crime. By November 1936, the

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<sup>1333</sup> Lehman to Roosevelt, 21 April 1930, FDRGP Box 48: Series 1, Lehman, Herbert H.

<sup>1334</sup> See Jewel Bellush, "Roosevelt's Good Right Arm: Lieutenant Governor Herbert H Lehman," *New York History*, Vol. 41, No. 4 (October 1960), 423–443, 436, 438.

<sup>1335</sup> James M Kieran, "Lehman Maps Out State Crime War," *New York Times*, October 6, 1935, 68.

<sup>1336</sup> W.A. Warn, "Lehman Opens Way for War on Crime," *New York Times*, 12 January 1936, E12.

<sup>1337</sup> Russell Owen, "Dewey Seeks Allies for a War on Crime," *New York Times*, 7 July 1935, E10.

<sup>1338</sup> In his published 1939 broadside against the administration, Raymond Moley takes pride in the early New Deal war on crime and decision to keep Hoover at the FBI. Moley, *After Seven Years* (New York and London: Harper & Publishers, 1939), 274–75.

<sup>1339</sup> Moley to Cummings, 18 May 1936, RMP Box 11 Folder 56.

<sup>1340</sup> Moley to Cummings, 2 June 1936, RMP Box 11 Folder 56.

bipartisan success of Roosevelt and Cummings’s coalition now made it possible for anyone who took crime seriously to choose party loyalties based on other issues—a prospect unthinkable ten years before, amidst the deep partisan divides over Prohibition.



Figure 7.1 “Lehman Anti-Crime Bills,” drawing by Rollin Kirby, 1936  
Source: Herbert Lehman Papers, Box 1403.

In New York, Governor Lehman continued to mirror the president’s multi-pronged embrace of prevention and repression. Lehman began 1937 urging the state legislature to adopt what remained of his previous year’s 60-point anti-crime program. In particular he championed a bureau of crime prevention, a state department of justice modeled after the federal Justice Department, a division of state police and central bureau of criminal investigation, an in-service training program for police, optional consolidation of local police units, non-personal service of subpoena for witnesses avoiding their service, a rule allowing trial judges to review evidence and advise the jury, gubernatorial clemency advice from judges, a felony murder law, women on juries, and a “farm colony or work camp” for the “detention of alcoholics and vagrants.”<sup>1341</sup>

Like Roosevelt and Cummings, Lehman admired the traditional institutions of state repression. Like J. Edgar Hoover, Lehman respected the American Legion, ensuring that New

<sup>1341</sup> State of New York, Message of Governor Herbert H Lehman to the Legislature, 6 January 1937, HLP 1405, Folder (Annual Messages to NYS legislature, 1933–38).

York rolled out the red carpet for the institution. The Legion's Matthew Troy thanked him for building a welcoming "Shrine of Americanism."<sup>1342</sup> Law enforcement agencies respected Lehman in turn. National organizations like the American Prison Association, the leading association of prison administrators, solicited his participation at luncheons and events.<sup>1343</sup> He was especially popular in his home state. In 1936 the New York State Sheriffs Association sought him as a convention participant and the New York State Police Conference asked him to address its banquet.<sup>1344</sup> In 1938 the New York State Association of Chiefs of Police offered to adjust the schedule of their annual convention to feature him as a speaker.<sup>1345</sup> The governor's address to the latter group in July of 1940 was well received.<sup>1346</sup>

Governor Lehman, like President Roosevelt, sought to balance an activist social welfare agenda and a flexible liberalism. The president of the New York Society for the Prevention of Crime praised his crime conference in 1935.<sup>1347</sup> On the left, social worker Lillian Wald corresponded with Lehman in affectionate solidarity on such issues as labor regulation, and Lehman found it worthwhile to share with her the proceedings from his crime conference.<sup>1348</sup> Civil libertarian groups respected his dedication. An ACLU event celebrating the 150<sup>th</sup> anniversary of the Bill of Rights requested his presence in both his "official capacity" and in recognition of his "valiant defense and championship of civil liberties."<sup>1349</sup> But Lehman's willingness to identify areas for bureaucratic improvement could provoke concern on the left. Leo Allen, head of the National Social Service Division, worried that his talk before the New York State Association of Public Welfare Officials had become too critical of the state. In criticizing selfish officials within the "relief machinery," Lehman had given aid to critics pushing for investigations of the relief system and had elicited "doubts in the minds of organized labor, the unemployed and progressive social workers."<sup>1350</sup> The Association's Elsie Bond, on the other hand, simply thanked him for the talk.<sup>1351</sup>

Unburdened by national considerations, Lehman enjoyed a more flexible liberalism than Roosevelt. On the one hand, the governor's vision was almost too progressive for the soft nationalism of war on crime federalism. While Lehman cheerfully agreed with Cummings on the national priority of surveying parole across the country, his liberalism clashed with Cummings's approach to interstate compacts.<sup>1352</sup> The interstate crime conference run by Richard Hartshorne particularly struggled to get New York's full participation. The parole and probation policies of many states remained inadequate, unworthy of New York's full reciprocity, Lehman believed. Investigating the question for Lehman, Joseph Moore reported that "Missouri itself has no parole

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<sup>1342</sup> Matthew Troy to Lehman, 27 Sept 1939, HLP Box 211, Folder 10.

<sup>1343</sup> Lehman to W.J. Ellis, 18 September 1937, HLP Box 211, Folder 19; Lehman to A.H. McCormick, 10 October 1939, HLP Box 211, Folder 19.

<sup>1344</sup> Richard Lewis to Lehman, 6 August 1936, HLP Box 253, Folder 2; David Cunningham to James Mahoney, 19 February 1936, HLP Box 253, Folder 2.

<sup>1345</sup> L.C. Abel to Herbert Lehman, 17 January 1938, HLP Box 253, Folder 1.

<sup>1346</sup> To R.W. Morris, 12 August 1940, 12 August 1940, HLP Box 253, Folder 2.

<sup>1347</sup> George Drew Ebert to Lehman, 4 October 1935, RSPC Box 1.

<sup>1348</sup> Lehman to Wald, 19 December 1934, LDWP Box 31, microfilm, reel 22; Lehman to Wald, 13 November 1935, LDWP Box 32, microfilm, reel 22.

<sup>1349</sup> Woolley, White, et al to Lehman, 6 February 1939, HLP Box 211, Folder 3.

<sup>1350</sup> Leo Allen to Lehman, 24 June 1938, HLP Box 253, Folder 5.

<sup>1351</sup> Elsie E Bond to Lehman, 27 June 1938, HLP Box 253, Folder 5.

<sup>1352</sup> Lehman to Cummings, 6 January 1936, AGSRP Correspondence with State Officials Entry 424 Box 1, folder: New York.

system which can be properly called as such.”<sup>1353</sup> Lehman told Harthorne that New York was unwilling to join a “blanket compact with any states with whose parole and probation methods and policies we are not familiar.”<sup>1354</sup> These incongruencies tempered Lehman’s enthusiasm in working with the ICC throughout the late 1930s.

Perhaps because he did not need to court Southern opinion and faced fewer limits on domestic executive power than the Roosevelt administration, Lehman also venerated civil rights and constitutional limits more than national New Deal Democrats. His 1938 talk before the American Bar Association reflected both tendencies. African-American R.B DeFrantz thanked him for a speech that stressed “exact equality for all groups in our complex population.”<sup>1355</sup> Gloria French agreed with his dissent from Roosevelt’s Supreme Court plan, suggesting it was a “hardly perceptible” transition toward “dictatorship and the shadow of Communism which are creeping over our land.”<sup>1356</sup> Paul Shea praised him as a “constitutional democrat” who should be president.<sup>1357</sup> Many others, including Republicans, praised the well-publicized speech.<sup>1358</sup>

And yet the war on crime consensus could transcend these disagreements. Despite any differences on court-packing, Roosevelt urged the public to vote for his political allies on their anti-crime credentials, championing Lehman for his eager enlistment of “law enforcement, young and vigorous prosecutors, irrespective of politics.”<sup>1359</sup> By a margin of 1.26%, Lehman defeated Thomas Dewey, his own prosecutor and criminal justice sidekick. Most likely, the outcome hardly mattered to the war on crime. Although accusations of lawlessness continued to fuel partisan messages, a vote for either candidate meant approval of New York’s bipartisan repression of lawbreakers.<sup>1360</sup>

Some continued to dissent from the liberal consensus of repression throughout most of the decade, although crime was rarely the contentious issue. While the ACLU in New York appreciated Herbert Lehman as a guardian of civil liberties, ACLU executive director Roger Baldwin pondered the national state uncomfortably. Baldwin had co-founded the ACLU after enduring incarceration for dodging Wilson’s draft. No fan of domestic censorship, Baldwin also had an uneasy relationship with illiberal currents of the radical left. He valued Marxist class analysis and worried over the rights of communists, but he never joined the Communist Party. In 1933 he found himself on the defensive for supporting “free speech for Nazis,” and noted that communists attacked his group for being “ivory tower liberals expressing the ideas of a decrepit and bankrupt middle-class liberalism.” But he recognized this Communist opposition as “honest. Communists make no pretense of supporting free speech on principle.”<sup>1361</sup> Baldwin criticized

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<sup>1353</sup> Joseph Moore to Lehman, 26 July 1937, HLP Box 237, Folder 29.

<sup>1354</sup> Lehman to Hartshorne, 20 September 1937 HLP Box 237, Folder 29.

<sup>1355</sup> R.B. DeFrantz to Lehman, 26 January 1938, HLP Box 253, Folder 7.

<sup>1356</sup> Gloria French to Lehman, 24 January 1938, HLP Box 253, Folder 7.

<sup>1357</sup> Paul H Shea to Lehman, 29 January 1938, HLP Box 253, Folder 7.

<sup>1358</sup> Publisher of Post-Standard to Lehman, 25 January 1938, HLP Box 253, Folder 7.

<sup>1359</sup> Radio Address on the Election of Liberals, 4 November 1938, APPUCSB.

<sup>1360</sup> In the beginning of 1939 Samuel Marcus resigned as director of the Society for the Prevention of Crime, accusing the group of partisan animus in its calls for investigations of Albany machine politics. Statement of the Society for the Prevention of Crime in Answer to the Charges Made by Samuel Marcus, MHB Box 596, Society for the Prevention of Crime, 1937–1941.

<sup>1361</sup> “Free Speech for Nazis?” 9 November 1933, RBP MC 005, Box 22 Folder 10: Debs.



those on the left who only supported “Liberty for Our Side,” and his respect for civil liberties would eventually warm him to the very liberalism he set out to oppose.<sup>1362</sup>

As for political economy, Baldwin worried that the activist liberal attempts to save capitalism from itself would only shore up corporate power. He expressed early skepticism that the New Deal would protect labor. He suspected that “despite himself” Roosevelt would find himself “bound by the enormous power of property interest” and that his “weight” would ultimately serve “the building up of monopoly capital to an even stronger position.” In 1934 Baldwin considered the analogy between the New Deal and the economics of fascist Germany and Italy “significant” even if “not by any means complete.”<sup>1363</sup> He agreed with Clarence Darrow’s thorough critique of the National Recovery Administration as an essentially corporatist enterprise.<sup>1364</sup>

Perhaps ironically, Baldwin’s labor emphasis muted his critique of the New Deal war on crime.<sup>1365</sup> If class analysis situated him as an early leftwing critic of the New Deal state, pessimism about the New Deal’s mainstream resonance paradoxically calmed his fears about its repressive capacity. In 1935 Baldwin suggested that the very popularity of New Deal liberalism mitigated its threat to civil liberties. It did not risk being fascistic because it lacked a “substantial opposition to suppress.” What remained was a threat to the extremist margins of political opinion. In particular, property interests sought to outlaw the small movements that threatened to unsettle the status quo. He thus found syndicalism laws a major concern.<sup>1366</sup> Baldwin was ambivalent, however, about the threat to criminal defendants. The ACLU had a central role to play in such high-profile cases as the Scottsboro Case of 1931, which brought attorney Osmond Fraenkel into the organization’s activism.<sup>1367</sup> In March 1936 Baldwin rebuked Justin Miller’s solicitation on “crime prevention,” insisting that the ACLU’s role was to curb the crime committed by law enforcement.<sup>1368</sup> But a few months later Baldwin revealed that criminal justice issues were not his priority. He was confident that “the rights of defendants” were neither “a political issue,” nor any longer “seriously under attack.”<sup>1369</sup>

For Baldwin, the liberal blind-spot toward the dangers of the growing state had more to do with labor and the related cause of peace than with crime and punishment. As early as 1935 Baldwin feared another war, theorizing that a “general strike” was needed to prevent one. “War

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<sup>1362</sup> For a look at the divergences among the left over the question of the “Brown Scare,” see Leo P. Ribuffo, *The Old Christian Right: The Protestant Far Right from the Great Depression to the Cold War* (Philadelphia, PA: Temple University Press, 1983), 178–224, 183.

<sup>1363</sup> Baldwin to Mr. Edward M Winston, 6 November 1934, RBP MC 005, Box 10, Folder 9: New Deal.

<sup>1364</sup> “What Liberty under the New Deal?” RBP MC 005, Box 23: Folder 7.

<sup>1365</sup> Laura M. Weinrib has argued that the New Deal fractured the interwar civil liberties coalition, forcing them to take sides, as anti-state legalists including conservatives were now pitted against progressive reformers and organized labor. Weinrib credits Baldwin’s “flexibility,” the balance between “credibility in radical circles while studying the limits of liberal tolerance.” Laura M. Weinrib, “Liberal Compromise: Civil Liberties, Labor, and the Limits of State Power, 1917–1940” (2011). *Other Publications*. Paper 4, 98

<sup>1366</sup> “Challenge to American Liberties?” 1935, Baldwin Papers, Race Relations.

<sup>1367</sup> Extracts from Diaries of Osmond K. Fraenkel, OFD Box 1 Folder 1.

<sup>1368</sup> Roger Baldwin to Miller, 17 March 1936, AGAC DF Box 4, Folder: civil liberties.

<sup>1369</sup> “The Constitution in the 20<sup>th</sup> Century Personal Liberty: Differing Views, John W McCormack vs. Baldwin,” the American Academy of Political and Social Science (reprint), 2 June 1936, NBC, “You and Your Government” series, XIII Lecture, No. 18, RBP Box 22: Race Relations.

in the Pacific looms,” he warned, “with the United States playing the role of aggressor.”<sup>1370</sup> He thought that “only the most naïve liberal,” hoping to preserve “law and order” and stem “violence against scabs,” would “resort to the ultimate power of the State.” Roosevelt’s government allowed militarism to go “unchecked” and rewarded the military’s foreign and domestic ambitions with an expansive budget and infrastructure, “the greatest peace-time war machine in our history.” Blinded by their middle-class position, liberals ignored the “lawlessness of the troops.”<sup>1371</sup> To win over Baldwin, the New Deal security state would first have to persuade him of its vigilance against the sort of chaotic repression that ensnared him in World War I.

### Securing New Deal America

Perhaps nothing better encapsulated liberal acquiescence in state coercion than the New Dealers’ support for the FBI. Starting in 1934, the Roosevelt administration worked to massively amplify the FBI’s powers primarily in the name of criminal justice. In the process the FBI adopted a holistic and integrated approach to the problems of law and order, particularly in its facilitation of professionalism, scientific forensics, and the modified war on crime federalism that accommodated energetic law enforcement powers across jurisdictions. While the New Deal activated this bureaucratic expansion, the Bureau also became an instrument of maintaining political legitimacy for the New Deal state, both narrowly and broadly understood. Roosevelt came to appreciate the use of J. Edgar Hoover’s Bureau in securing his partisan vision of America against its domestic critics.

Through the end of the 1930s, even as the New Deal vision for criminal justice enjoyed broad approval and shaped the contours of political engagement, the New Deal state’s expansive exercises of domestic power drew skepticism from both left and right. Critics feared that the Roosevelt administration would trample constitutional liberties whether in protection of the economic elite or in the pursuit of radical economic change. And yet however expressed in partisan terms, these critiques became marginalized or quieted by the very logic of electoral politics, the appeal of New Deal liberalism as a moderating orientation among extremist alternatives, and the institutional power of the security state itself. Utilizing the surveillance mechanisms constructed for Cummings’s war on crime to defend the New Deal state against its political enemies turned the FBI into the enforcement arm of Roosevelt’s liberalism. Through federal surveillance, Roosevelt enlisted J. Edgar Hoover’s FBI into the forcible protection of liberalism, redefining it along the way.

Beginning in 1934, the organization ballooned in power, scope, and prestige. The interstate pursuit of fugitives did not subside in 1934, the cultural peak of the war on organized crime. In early 1935 the FBI reported 39 fugitives located and apprehended, the “highest figure recorded . . . in a considerable period of time.”<sup>1372</sup> Year by year, Attorney General Cummings negotiated with budget hawks to expand the bureaucracy.<sup>1373</sup> Press reports that Cummings threatened to quit over budget cuts pressured the administration to heed his plan for growth.<sup>1374</sup> Cummings

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<sup>1370</sup> “How Shall We Fight War and Fascism?” February 1935, RBP MC 005, Box 23: Folder 1: Radicalism.

<sup>1371</sup> “The Strike Breaking Militia,” RBP MC 005, Box 23: Folder 1: Radicalism

<sup>1372</sup> Memorandum for Attorney General, 17 April 1935, OF10b: DOJ FBI, 1935–1936.

<sup>1373</sup> Memorandum for the President, 19 January 1935, OF10b: DOJ FBI, 1935–1936.

<sup>1374</sup> Charles Stevenson, “Roosevelt’s Budget Slaps at Cummings,” OF10b: DOJ FBI, 1935–1936.

envisaged a more preventive role for the FBI, pushing for an Appropriation Act change to add “prevention” to the bureau’s role in the “detection and prosecution of crimes.”<sup>1375</sup> Then in 1935 the FBI training school opened, forging a direct institutional line between the federal government and local police throughout the country. For the rest of Roosevelt’s presidency, local law enforcement thanked him and Hoover.<sup>1376</sup> Roosevelt too won the reputation as an ally of local policing.<sup>1377</sup>

By the mid-1930s the FBI’s rapidly expanding role in internal security provoked concerns and inspired admirers. Having secured a war on crime consensus through sharing of responsibilities across institutions, Justice risked alienating Treasury, whose Secret Service protected the president. At a major address before Congress in May 1935, the FBI worried that Morgenthau was “somewhat annoyed and irritated” by the FBI’s charge to protect the Capitol.<sup>1378</sup> The Bureau was meanwhile militarizing. In May 1936 Senator Arthur Vandenburg argued on behalf of Hoover that Roosevelt and Congress empower the FBI to deploy aviation capacity without procuring approval of each instance. An airborne FBI would “make the ‘G Men’ even more formidable than they are today in their great battle against crime.”<sup>1379</sup> Although the FBI did not gain these powers immediately the proposal proved prophetic.

All the while, the FBI was serving to network local law enforcement to the growing New Deal government. The FBI’s technical lab, opened in 1932, was modernizing and enjoying a New Deal surge of funding, all of which contributed to the new convergence between crime-fighting and the fledgling security state. By sharing forensic intelligence with the nation’s local law enforcers, the FBI simultaneously bolstered the street-level battle with crime, a seemingly traditional enterprise, and radically modernized the crusade against crime as something preemptive and national, an undertaking of surveillance and cutting-edge technology. Nowhere were the modern surveillance state’s local ambitions clearer than in the realm of fingerprinting. Hoover’s FBI pondered the full policy significance of the technology, even studying the “so-called civil or non-criminal” applications of fingerprints for Cummings and Roosevelt.<sup>1380</sup> The Bureau celebrated the efficacy of state-level fingerprinting in apprehending and sentencing prisoners, an interstate affair that perfectly captured the workings of war on crime federalism. Fingerprints from the war department’s enlistment records would be utilized in hundreds of cases by local governments to aid their local criminal justice efforts.<sup>1381</sup> The 1937 reorganization bill allowed the removal of fingerprint classifiers from the competition of the civil service.<sup>1382</sup> In 1939 Hoover looked forward to the day when Americans would clamor for universal fingerprinting, pushing against those who condemned it as “violation of civil liberties” and calling it instead “liberty-insurance.”<sup>1383</sup>

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<sup>1375</sup> To Dear Mr. Bell, 15 June 1935, OF10b: DOJ FBI, 1935–1936.

<sup>1376</sup> Miller, Fred, pacific coast international assn of Law Enforcement Officials, Oregon City, Oregon, 29 September 1937, OF 10b: DOJ FBI 1933–1940.

<sup>1377</sup> RW Morris to President, 26 August 1938, OF 10b: DOJ FBI 1937–1938.

<sup>1378</sup> Memorandum for the Attorney General, 23 May 1935, Memorandum for the Attorney General, 23 May 1935.

<sup>1379</sup> Arthur Vandenberg, US Senate, 6 May 1936, to President, OF10b: DOJ FBI, 1935–1936.

<sup>1380</sup> Cummings to President, 16 March 1935, OF10b: DOJ FBI, 1935–1936.

<sup>1381</sup> Memorandum for the Attorney General, 15 March 1935 – from J Edgar Hoover, OF10b: DOJ FBI, 1935–1936.

<sup>1382</sup> Roosevelt to the Attorney General, 23 November 1937, OF10b: DOJ FBI, 1937–1938.

<sup>1383</sup> Address delivered by J Edgar Hoover, before the National Convention, US Junior Chamber of Commerce, Tulsa, 21 June 1939, “Your Task as a Citizen, OF10b: DOJ FBI, 1939.

The fingerprinting state brought criminal justice and New Deal liberalism together in a joint project of modernization. But while voluntarism wasn't working, compulsion was a bridge too far.<sup>1384</sup> When Berkeley's progressive police reformer August Vollmer asked for Roosevelt's endorsement of a universal fingerprinting plan in Berkeley, the Attorney General worried that the practical consequence would be calls for universal fingerprinting nationwide, which they could not handle.<sup>1385</sup> The politics were sometimes controversial, as when the president decided to delay a decision on whether to mandate fingerprinting among CCC workers until after the 1936 election.<sup>1386</sup> Roosevelt and his administration decided that members of the cabinet would put their fingerprints in the FBI file publicly, to shore up national support for the program.<sup>1387</sup> Even as universal compulsion was off the table, the modern fingerprinting state, integrated with the welfare state, would continue to combat crime. The WPA collected fingerprints. Local officers collected fingerprints of transients, thousands of whom had turned out to be wanted criminals. The technology produced results.<sup>1388</sup>

Having overseen a grand expansion of the FBI, Roosevelt regarded Hoover's Bureau as an effective mechanism in guarding the liberal state against its opponents, both radical extremists and routine partisans. Starting in his first term, FDR directed Hoover to surveil fascists and communists. Taking office amidst the threat of lawlessness, disorder, and anarchy, Roosevelt was from the beginning concerned about American security, as well as his own presidency. When Smedley Butler informed J. Edgar Hoover of a possible fascist coup against Roosevelt, it only reinforced this connection. In August 1936, FDR asked Hoover to develop a "broad picture" of the extremist threat.<sup>1389</sup> The two men bonded in a relationship that at times circumvented Cummings—and would prove to outlast his official duties. In September Hoover began to implement Roosevelt's request that he inquire into fascist and communist activities, five days before even informing Cummings.<sup>1390</sup> The use of the surveillance state to secure New Deal America blurred the lines of New Deal liberalism as a particular policy agenda and American liberalism as the democratic norm against which illiberal agitators mobilized.

Beyond targeting threats to the homeland, Roosevelt quickly saw the value of tracking political adversaries through the FBI. He asked the Justice Department to "find out who is paying for" a pamphlet put out by the Industrial Defense Association that accused him of bringing "the country under a socialist regime."<sup>1391</sup> In 1935 the FBI scrutinized anti-New Deal activists in the Protestant Civic Welfare Organization and people who wanted to see Roosevelt impeached.<sup>1392</sup> The FBI produced a report on Robert Edward Edmondson, an economist alleged to be accusing the administration of nefariously pushing a Jewish-communist-alien conspiracy.<sup>1393</sup> A concern arose in October 1935 when Hoover warned that war veterans evacuated by the Florida Keys

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<sup>1384</sup> Fechner, Hon Robert, Director, Emergency Conservation Work, 29 February 1936, OF10b: DOJ FBI, 1933–1940.

<sup>1385</sup> Attorney General, 2 March 1936, OF10b: DOJ FBI, 1933–1940.

<sup>1386</sup> Attorney General, 26 December 1935, 27 February 1936, OF10b: DOJ FBI, 1933–1940.

<sup>1387</sup> Memo for Attorney General, 26 July 1935, OF10b: DOJ FBI, 1933–1940

<sup>1388</sup> Address delivered by J Edgar Hoover, before the National Convention, US Junior Chamber of Commerce, Tulsa, 21 June 1939, "Your Task as a Citizen, OF10b: DOJ FBI, 1939.

<sup>1389</sup> Curt Gentry, *J. Edgar Hoover: The Man and the Secrets* (New York, W.W. Norton, 1991), 204–5, 207.

<sup>1390</sup> Katznelson, *Fear Itself*, 326.

<sup>1391</sup> Memo for Attorney General, 25 June 1935, OF10b: DOJ FBI, 1933–1940.

<sup>1392</sup> Postmaster General, 5 February 1935, Dingell, Rep John D, 8 February 1935.

<sup>1393</sup> Attorney General, 7 February 1936, OF10b: DOJ FBI, 1933–1940,

“might undertake some act of physical violence upon the president.”<sup>1394</sup> Later Roosevelt asked Hoover if criminal libel could be used against *Liberation Magazine* for its harsh criticism of the president.<sup>1395</sup> The president’s political detractors also worried for their physical safety. A Chamber of Commerce event in Memphis in May 1936 feared “interference from Washington” after the assassination of Huey Long.<sup>1396</sup> In June, the Constitutional Party convention, planned for Tennessee, also fretted about interference from Washington, provoked by their opposition to the New Deal.<sup>1397</sup>

Although some historians have focused on Hoover’s hand in this presidential spying, it is a mistake to deemphasize Roosevelt. The New Dealers employed surveillance against domestic critics even outside the mechanisms of the FBI.<sup>1398</sup> In 1935, facing political and judicial obstacles to New Deal regulation, Roosevelt enlisted Senator Hugo Black to use his subpoena powers to investigate opponents of the newest proposal to empower the Securities and Exchange Commission to abolish monopolies found to be insufficiently “geographically or economically integrated.” Under Black the U.S. Senate Special Committee to Investigate Lobbying Activities subpoenaed telegrams and tax information going back to 1925, before being reined in by journalists, the FCC, and Congress. Although its mission creep provoked resistance from the ACLU, many progressive New Dealers defended the Committee.<sup>1399</sup>

While Roosevelt’s allies unleashed the soft instruments of repression on conservative opponents, the president also targeted those on the left seen to threaten the New Deal state. Indeed, it was sometimes within the ideological incubation of the New Deal’s welfare institutions that labor radicalism threatened stability. J Edgar Hoover was concerned about a WPA strike that would gain national significance in October 1936.<sup>1400</sup> He worried that the American Youth Congress was communistic.<sup>1401</sup> In July 1937 he reported on the threat of a

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<sup>1394</sup> Hoover to Howe, 17 October 1935, OF10b: DOJ FBI, 1935–1936.

<sup>1395</sup> Hoover, 23 December 1938, OF10b: DOJ FBI, 1933–1940

<sup>1396</sup> Hopping to EE Lagadon, Convention Bureau Chamber of Commerce, Memphis, 25 May 1936, OF10b: DOJ FBI, 1935–1936.

<sup>1397</sup> Attorney General, 18 June 1936, OF10b: DOJ FBI, 1933–1940.

<sup>1398</sup> Some historians have tended to emphasize J Edgar Hoover’s agency over Roosevelt’s in the construction of the surveillance state. Athan Theoharis, the most prolific academic historian of the FBI, situates the origins of modern domestic surveillance in the New Deal years, but extensively argues that the 1936 and 1939 presidential directives did not authorize Hoover to go as far as he did. Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (Philadelphia: Temple University Press, 1978), 67. In a historiographical discussion of Hoover’s relative control over the Bureau’s surveillance scope, Melissa Graves sees a decline in the director’s control in the years after the 1930s, during which historians have tended to attribute the Bureau’s surveillance scope more to Hoover than the president. See Melissa Graves, “FBI Historiography: From Leader to Organisation,” in Christopher R. Moran and Christopher J. Murphy, *Intelligence Studies in Britain and the US* (Edinburgh: Edinburgh University Press, 2013), 129–145, 139. Christopher Andrew, on the other hand, attributes the FBI’s murky responsibilities to the “enduring element of vagueness” of Roosevelt’s mention of “subversion” in his September 6, 1939, directive. Christopher Andrew, *For the President’s Eyes Only: Secret Intelligence and the American Presidency from Washington to Bush* (Harper Collins, 1995), 91. O’Reilly finds that “Whether or not President Roosevelt would have approved this sweeping order, he was willing to use the FBI’s resources for political as well as national-security purposes.” Kenneth O’Reilly, “A New Deal for the FBI: The Roosevelt Administration, Crime Control, and National Security,” *Journal of American History* 69, No. 3 (Dec 1982), 647.

<sup>1399</sup> David T. Beito, “New Deal Mass Surveillance: The ‘Black Inquisition Committee,’ 1935–1936,” *The Journal of Policy History* 30, No 2, 2018.

<sup>1400</sup> Carusis, Hon. Ugo, Exec. Assistant to the Attorney General, 23 October 1936, OF10b: DOJ FBI, 1933–1940

<sup>1401</sup> 30 June 1937, OF10b: DOJ FBI, 1933–1940.

Workers' Alliance plan to sponsor a WPA hunger march.<sup>1402</sup> The goal was to expose the plight of WPA workers, but the march, financed by the Communist Party, was regarded by the Justice Department as a threat to New Deal liberalism of a different sort.<sup>1403</sup> The plan was to march in March 1938, a "pilgrimage for peace and security."<sup>1404</sup> Another march was planned for later in 1938 by the Trade Union Committee on Employment and WPA.<sup>1405</sup> The administration would spend the next few years pondering possible means of managing such dissent.

Under Cummings the FBI's talk of "war" fit comfortably within New Deal rhetoric and analogy. Cummings's war on crime was a national emergency, the militaristic corollary to Roosevelt's mobilization against economic hardship. In an April 1937 speech Hoover touted law enforcement's "patriotic duty toward the welfare of America" and condemned the "dishonorable gangs of the underworld" whose "crime army. . . marshals its forces" of "more than 4,300,000 criminals"—an approximation of total lawbreakers he would return to with slight variation. The struggle required all available domestic resources. While he aimed for "re-establishment of the tradition" that looked down on crime's "vermin-like aspects," Hoover's critique of modernist experimentation echoed Roosevelt's critique of Prohibition for having fueled black markets. Hoover also agreed with the New Dealers that repression alone was not enough. Hoover wanted "every college in America" to have a criminological curriculum. Law enforcement needed higher recruiting standards and the "parasites" of "municipal corruption" needed rooting out. He condemned the cities' "reactionary officials" who thwarted "forward-looking" visions of law enforcement.<sup>1406</sup> Later that month Hoover told a group of journalists that the "forward-looking newspaperman" was necessary to combat "municipal corruption."<sup>1407</sup> In another speech Hoover stressed the "definite relationship" between battling lawlessness and protecting the economy, the deep connection between "national and local business security."<sup>1408</sup> Hoover's rhetoric situated his war on crime not only as a soldierly struggle but as a domestic crusade within the New Deal ethos of holistic social solutions and good governance.

Lee R. Pennington, one of Hoover's top men, echoed his boss. In January 1938 he hailed the new federal-local cooperation against "the ravages of the lawless." He repeated Hoover's estimate of 4.3 million criminals on the "national front," which cried for resistance from "all the 40,000 law enforcement agencies in the United States."<sup>1409</sup> Three months later Pennington warned that crime had "reached a pinnacle of appalling heights," its "blood-caked hands" brutalizing America, taking a life every 39 minutes. Like Roosevelt and Hoover he emphasized "scientific crime detection" and education. He touted that 85% of FBI special agents now had

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<sup>1402</sup> Hopkins, Hon. Harry L., 8 July 1937, OF10b: DOJ FBI, 1933–1940

<sup>1403</sup> Attorney General, 13 August 1937, OF10b: DOJ FBI, 1933–1940

<sup>1404</sup> Hoover, Jon John Edgar, 12 January 1938, OF10b: DOJ FBI, 1933–1940

<sup>1405</sup> Hopkins, Hon. Harry L., 15 June 1938, OF10b: DOJ FBI, F.B.I., 1933–1940

<sup>1406</sup> Address Delivered by J Edgar Hoover, Penn Athletic Club, Philadelphia, 14 April 1937, OF10b: DOJ FBI, 1937–1938.

<sup>1407</sup> Remarks of John Edgar Hoover, Annual Dinner of the American Newspaper Publishers Association, "Law Enforcement and the Publisher," 22 April 1937, OF10b: DOJ FBI, FBI 1937–1938.

<sup>1408</sup> "Lawlessness – A National Menace," Hoover to Economic Club 14 November 1939, OF10b: DOJ FBI, 1937–1938.

<sup>1409</sup> Address by Lee R Pennington, FBI, 13 January 1938, Chamber of Commerce, Covington KY, LPP Box 16.

legal training.<sup>1410</sup> Hoover and Pennington's domestic war was in no respect an aberration in Roosevelt's program, but rather the unapologetically coercive projection of the new pragmatic liberalism.

By the late 1930s, American liberalism had embraced domestic repression, bringing together national and state wars on crime and recruiting the FBI to defend the New Deal state. The administration's promotion of war on crime federalism had enlisted police forces nationwide into supporting the presidency. The logic of surveillance could secure America from all threats, but it could also serve a partisan purpose. Just as he did when he came to office, Roosevelt feared extremism and unrest, fascism as well as radicalism on the left. FDR cultivated Hoover, and the men developed an affinity for one another. In July 1937 Hoover thanked Roosevelt for a letter congratulating him for twenty years in the Bureau. "Words are inadequate to express my appreciation for your thoughtfulness," wrote Hoover. "I shall certainly continue to endeavor to merit that confidence and faith which you have expressed," the FBI head continued, satisfied he was at least doing a "little in trying to make America a safer and better place in which to live."<sup>1411</sup> The focus on partisan enemies brought the FBI closer into Roosevelt's circle of confidence, but also paved the way for securing a broader notion of liberalism—not just of the ruling Democratic Party, but the liberalism of American values. As the 1930s gave way to the 1940s, securing of New Deal America took on a different meaning, one that brought opposing strains of American politics into the project of building a distinctly liberal security state.

### Preparing for War

A general anxiety loomed over America in 1939. The national motif of pacifist militarism, the defining paradox of interwar America, was approaching its crest. In December, Herbert Lehman averred that "adequate preparedness is not an incentive to war as some would have us believe." Instead, as he told Robert Appleton of the American Defense Society, Lehman agreed with George Washington that "during peace is the time to prepare against war."<sup>1412</sup> For two decades, conscientious objectors, social workers, and labor agitators demanded de-escalation while militarists worked to arm the state. In the last anxious years of peace, Roosevelt faced the challenge of recruiting radical anti-fascists to his left and militant patriots to his right into a new security state coalition.

He succeeded. From 1939 through 1941, the objective and subjective conditions emerged for a new kind of security state—modernized, stable, and liberal. The infrastructure of war on crime federalism blossomed into a security state federalism, as Hoover's Bureau served as dispatch for the nation's military and police.<sup>1413</sup> Criminal law weaponized against the subversive continued to

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<sup>1410</sup> Pennington, "The FBI and its War on Crime," Rotary Club of Chattanooga, Tennessee, 21 April 1938, LPP Box 16.

<sup>1411</sup> Hoover to Roosevelt, 29 July 1937, OF10b: DOJ FBI, 1937–1938.

<sup>1412</sup> Lehman to Appleton, 14 December 1939, HLP Box 211, Folder 9.

<sup>1413</sup> Scholars of the FBI have noted the astonishing institutional changes in the late 1930s, but have tended to tell the story as separate from the development of New Deal liberalism. Over a few years, as Raymond J Batvinis puts it, the FBI "evolved from a law enforcement agency with virtually no counterespionage mandate into the United States' first organized, sustained counterespionage service; then into the first counterintelligence service; and then into the first organized civilian foreign intelligence service." But while Batvinis highlights the "remarkable" decisions Roosevelt made to create in "a short period, and in complete secrecy, a formidable U.S. security structure," he only briefly discusses criminal enforcement and he sees the development mostly as a contingent response to concrete

build the domestic state. The war on crime consensus gestated into a security consensus as the specters of totalitarian ideology and global calamity coalesced with war preparation. In wielding the most awesome of domestic powers, Roosevelt brought previously conflicting voices into the project of New Deal liberalism.<sup>1414</sup> The ACLU's critiques softened and Republicans began to trust Roosevelt even with powers they found constitutionally suspect. Strains of politics that had opposed each other since World War I converged in previously unthinkable ways, as New Deal liberalism forged a synthesis of radicalism, progressivism, and conservatism. As the new liberals embraced the security state, the security state took on a more liberal cast. From the right and left, critics of the New Deal's alleged hostility to liberty helped liberalize the security state, which they increasingly trusted to guard democratic order. This ideological and institutional coalescence prepared the security state for the war and the years beyond.

Cummings retired after almost six years as Attorney General. None of his successors served as long. But if Cummings stabilized, popularized, and liberalized the war on crime, Frank Murphy, Robert Jackson, and Francis Biddle produced the sustainable peacetime security state. If in the Cummings years talk of "war" was mostly analogy, under Attorneys General Murphy, Jackson, and Biddle, the emphasis became much less metaphorical. When Roosevelt took office, the FBI handled about thirty-five national defense cases per year. This figure climbed to 250 for fiscal year 1938, 1,651 for 1939, 16,000 for 1940 and 68,000 in 1941.<sup>1415</sup> The doubled threat of lawlessness and enemy subversion became more severe. Criminal justice could continue to pursue the ideological nemesis. In an October 1939 speech on "law enforcement in crisis," Hoover railed against the twin threats to freedom. America must guard not only against "onslaughts" from criminals, but against the "devious machinations" of those with "enemy modes of thought and action," against "subversion in all its forms."<sup>1416</sup> For Roosevelt, this shift meant clarifying the line between protecting New Deal partisanship and protecting the liberal order. In August 1939, prompted by a scandal of WPA employees lobbying in the 1938 election, the president signed into law the Hatch Act, which restricted lobbying by federal employees. The reorientation toward enemies of the liberal democratic order animated Roosevelt and Hoover, who became both uncompromising and yet more conscientious of the dangers of unmeasured reaction.

Frank Murphy took office in January 1939, pleasing Hoover with his plans to "rebuild the Nation's law office" and to purge political influence from promotions.<sup>1417</sup> But Murphy did much more. He officiated the marriage of the criminological state to national defense, and by elevating

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security threats rather than a coherent outgrowth of the New Deal war on crime. Raymond J Batvinis, *The Origins of FBI Counterintelligence* (Lawrence, KS: University Press of Kansas, 2007), 1, 258.

<sup>1414</sup> Historian John Jeffreys has emphasized Roosevelt's importance to liberalism after his first term. From 1937 on, the march of social policy driven by a "reorganized executive branch with enhanced national planning and administrative capability" constituted what other scholars have called a "new New Deal" or "Third New Deal." Jeffreys focuses on political economy rather than liberalism's transformative relationship to state coercion from the late 1930s through the 1940s. John W. Jeffreys, "The 'New' New Deal" FDR and American Liberalism, 1937–1945," *Political Science Quarterly*, Vol. 105, No. 3 (Autumn 1990), 397–418, 397.

<sup>1415</sup> Pennington, "Americanism and the Citizen," undated address to American Legion, LPP Box 16, folder 1.

<sup>1416</sup> J. Edgar Hoover, before NU Herald-Tribune Forum, 24 October 1939 "Law Enforcement in a Crisis," OF10b: DOJ FBI, 1939.

<sup>1417</sup> Address delivered by J Edgar Hoover, before the National Convention, US Junior Chamber of Commerce, Tulsa, 21 June 1939, "Your Task as a Citizen" OF10b: DOJ FBI, 1939.



Hoover's Bureau as leader of both national intelligence and domestic policing prepared the security state for its next national crisis. The FBI under Murphy became a key leader in intelligence. Previously, the task fell to an informal committee run by representatives from State, Treasury, War, Justice, Navy, and the Post Office. But because of its massive data resources, its technical laboratory and identification division, Murphy reasoned in June 1939 that the FBI should share management of national intelligence with the Military Intelligence Division and ONI.<sup>1418</sup> That same month FDR put out the order.<sup>1419</sup> The Secretary of Treasury and Postmaster acknowledged the new presidential directive that these three national bodies would coordinate all intelligence of espionage, counter-espionage, and sabotage.<sup>1420</sup> Their authority endured some new restraints. The subordinated Secretary of State would continue intelligence gathering but with orders to appraise the big three of its operations.<sup>1421</sup> At the end of the year the administration restricted these officials' access to census files, while inviting them to make specific requests for census information.<sup>1422</sup>

The foreign-policy implications of the FBI's new role unfolded in the coming years, but Murphy's domestic transformation also carried profound consequences. In September 1939, Murphy suggested that state and law enforcement agencies share in gathering national defense intelligence.<sup>1423</sup> FDR empowered Murphy to instruct the FBI to take charge of investigations of espionage, sabotage, and violations of neutrality on a "comprehensive and national basis." Murphy then asked "all police officers, sheriffs, and all other law enforcement officers" that they provide "to the nearest" FBI representative "any information obtained" in connection to these matters as well as "subversive activities."<sup>1424</sup>

Through the FBI's new intimacy with local police, Murphy transformed war on crime federalism into security-state federalism. Many police already recognized the FBI's utility. Between 1934 and 1940, the FBI helped solve 797 bank robberies.<sup>1425</sup> Now, in the name of national security, police became the eyes and ears of a centralized administration that had only been fully authorized to investigate crimes five years before. The local authorities gained from the arrangement. The FBI furnished fingerprints and forensic assistance and used the technology to detect whether commuted convicts had returned to crime.<sup>1426</sup> While boasting of the FBI's National Police Academy and having solved 154 out of 156 kidnapping cases since 1932, Hoover applauded the capacity to search fingerprints in three minutes from a file of 11

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<sup>1418</sup> Attorney General to president, 17 June 1939, OF10b: DOJ FBI, 1939; Memorandum for . . . 26 June 1939.

<sup>1419</sup> Presidential Memorandum for the Secretary of State, Secretary of the Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of the Navy, Secretary of Commerce, OF10b: DOJ FBI, 1933–1940.

<sup>1420</sup> Sec of Treasury, 29 June 1939, OF10b Justice Dept, FBI 1939; Postmaster General to President, 30 June 1939; OF10b: DOJ FBI 1939.

<sup>1421</sup> Memorandum for Secretary of State, 26 June 1939, OF10b: DOJ FBI 1939.

<sup>1422</sup> Memorandum for the President, 7 December 1939, OF10b: DOJ FBI, 1933–1940.

<sup>1423</sup> Attorney General to President, 6 September 1939; OF10b: DOJ FBI, 1939.

<sup>1424</sup> The President Issued a Following Statement on 6 September 1939, OF10b: DOJ FBI, 1939.

<sup>1425</sup> This meant lower insurance rates, pointed out Pennington. The Federal Bureau of Investigation as an Aid to the Banker, Address by Pennington, Forty-Fourth Annual Convention of the Oklahoma Bankers Association, 2 May 1940. LPP 16, folder 1.

<sup>1426</sup> The Attorney General, 23 October 1939, OF10b: DOJ FBI, 1933–1940.

million.<sup>1427</sup> By the end of 1939 the goal became comprehensive fingerprinting of aliens and passport applicants.<sup>1428</sup>

Police across America appreciated the new arrangement in the struggle against crime and subversion. The Pacific Coast Association of Law Enforcement at their annual convention in Mexico November 1939 resolved to defend the FBI from attacks by its enemies, the “subversive forces in this country.”<sup>1429</sup> The Wisconsin Chief of Police Association praised J. Edgar Hoover and Murphy, the FBI and crime laboratory, fingerprinting database, information clearing house, and statistical records.<sup>1430</sup> Security-state federalism not only accommodated expansive power at all levels of government, but bound them in an empire of mutually enforcing jurisdictions more formidable than the sum of its parts.

The expansion of the FBI was also effecting an ideological transformation, splitting both the left and right behind a more vigilant yet inclusive security state. In targeting the right, Roosevelt no longer fixated mainly on critics of the New Deal, but rather with opponents of liberal democracy. Of course, a discerning anti-fascism comfortably fit with New Deal goals. FDR’s supporters on the left encouraged such efforts. In 1936, the National Blue Shirts of America, claiming 38,000 members, supported Roosevelt busting up pro-Nazi meetings.<sup>1431</sup> But later the emphasis on rightwing extremism shifted from guarding the New Deal state to a question of national security. Roosevelt ordered Hoover to “look into” various extremist agitators like Joseph E McWilliams of the American Destiny Party.<sup>1432</sup> Roosevelt and Hoover kept tabs on possible Nazi fifth columnists at the Blue Ribbon German Restaurant in New York City.<sup>1433</sup> National security concerns drove the FBI’s investigation of suspected German-American Bund Groups, pro-fascist Silver shirts, and espionage in Navy yards.<sup>1434</sup> Members of the German-American Bund were suspected of wanting a coup against Roosevelt.<sup>1435</sup> Hoover investigated anti-Semitic activities, including a circular accusing Roosevelt of planning “To make the world safe for communistic jewry” (sic).<sup>1436</sup> The FBI took anti-fascism seriously, as the threat of overthrow carried greater resonance while Hitler consolidated geopolitical power.

The administration’s surveillance also drove a wedge in the left. Communism within and outside the United States, as well as in territorial spaces like Puerto Rico, vexed J. Edgar Hoover.<sup>1437</sup> Pennington, a future Cold War icon, feared communism almost as much as fascism. But compared to red-baiters further on the right, the FBI’s anti-communism fit comfortably with Roosevelt’s. As with McCarthyism years later, the more virulent anti-communists legitimated the moderate repression undertaken by liberals. The House Committee on un-American Activities, under conservative Texas Democrat Martin Dies, was the most compelling of foils.

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<sup>1427</sup> Hoover, Address delivered by J Edgar Hoover, before the National Convention, US Junior Chamber of Commerce, Tulsa, June 21 1939, “Your Task as a Citizen” OF 10-b Justice Dept, FBI 1939.

<sup>1428</sup> OF10b: DOJ FBI, 1933–1940.

<sup>1429</sup> John M Walker, Sec Treasury of Pacific Coast Assn of Law Enforcement Official, 6 June 1940, OF10b: DOJ FBI, 1940.

<sup>1430</sup> Wisc. Chiefs of Police Association 26 October 1939, OF10b: DOJ FBI, 1939.

<sup>1431</sup> Lazare, Ben, National Commander, 2 Jan 1936, OF10b: DOJ FBI, 1933–1940.

<sup>1432</sup> Memorandum for the Attorney General, 10 June 1940, OF10b: DOJ FBI, 1933–1940.

<sup>1433</sup> Hon J Edgar Hoover, 12 June 1940, OF10b: DOJ FBI, 1933–1940.

<sup>1434</sup> Attorney General, 5 January 1939, to President, OF10b: DOJ FBI, 1939.

<sup>1435</sup> OF 10b: Justice Dept, F.B.I., 1933–1940, OF10b: DOJ FBI, 1933–1940.

<sup>1436</sup> Hoover, 20 March 1939, OF10b: DOJ FBI, 1933–1940.

<sup>1437</sup> Hoover, 13 December 1938, OF10b: DOJ FBI, 1933–1940.

The Committee harassed unions and saw New Deal liberalism itself as potentially subversive.<sup>1438</sup> In attempting to pit Hoover against Roosevelt, Dies irritated both. The Committee accused the New Deal of privileging communists, and the FBI investigated its allegations that the Federal Writers Project restricted employment to Workers' Alliance members.<sup>1439</sup> At the same time, some on the right feared that even Hoover did not appreciate the urgency of the House Committee's warnings. The Order of Independent Americans' Perry Ramey McIntyre urged Hoover and the administration to give "full cooperation" to the Dies Committee, a request Roosevelt wanted to affirmatively accept, but he worried that Dies would obstruct FBI investigations.<sup>1440</sup> The ACLU affirmed the distinction between the New Deal state's responsible anti-communism and its illiberal analogues, condemning in June 1939 the reckless "anti-democratic propaganda. . . aimed allegedly at Communism and in part against Jews," but "in fact directed against progressive movements, the New Deal, and the C.I.O."<sup>1441</sup> In a sense it was in these years that Cold War liberalism was born.

Even as patriotic leftists preferred the FBI's measured anti-communism over Dies, and even as patriotic conservatives agreed that Nazism posed a domestic threat, Roosevelt's security state reassured civil dissidents with vows of lawful process. Unlike in the shadow of World War I, anti-vigilantism would round out the new liberal security state. The ACLU had for years decried mob and quasi-militarist violence. In October 1939 its national leadership planned a letter to Murphy and Hoover "requesting clarification" of the Justice Department's "position on the organization of local vigilante groups intended to cooperate with the Department."<sup>1442</sup> That same month, while Hoover cautioned Americans to avoid a "lecherous barnacles of venal politics," he also warned against a "witch hunt." "Bands of vigilantes" were "un-American, unpatriotic, and subversive." The liberal security state was rational, tempered. A "law-abiding nation" would resist anarchic vigilantes as well as subversives and "America's crime army."<sup>1443</sup> The state and its allies would have to uphold law to secure the country.

The new liberal security state promised a more diverse ideological pluralism than before, while pledging ruthlessness against the authentically un-American. Even radicals enjoyed protection under this umbrella, and in exchange they signed on to democracy's violent struggle against outright illiberalism. In early 1939 Baldwin recognized that his movement appeared to have taken "a more radical approach ten years ago" but now "democracy [was] on the defensive," and replaced socialism as the relevant rallying cry against fascism's onslaught.<sup>1444</sup> The urgent threats were fascists, communists, and vigilantes, rather than anti-New Deal conservatives and labor agitators. The radical left could cheer the New Deal state's crackdown

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<sup>1438</sup> Curran, Joseph. National Maritime Union of America President, 19 October 1940, OF10b: DOJ FBI, 1933–1940.

<sup>1439</sup> Attorney General, 5 January 1939, to President, OF10b: DOJ FBI, 1939.

<sup>1440</sup> Hon J Edgar Hoover, 14 November 1938, OF10b: DOJ FBI, 1933–1940; Dies, Hon Martin, 9 October 1940, OF10b: DOJ FBI, 1933–1940.

<sup>1441</sup> American Civil Liberties Union, June 1939, HLP Box 211, Folder 3.

<sup>1442</sup> ACLU Board of Directors, Minutes, 9 October 1939, ACLU NC Carton 1, Folder 9: Natl Minutes–Board of Directors, 1938–1939.

<sup>1443</sup> J Edgar Hoover, before NU Herald-Tribune Forum, 24 October 1939 "Law Enforcement in a Crisis," OF10b: DOJ FBI, 1939.

<sup>1444</sup> "What Shall We Do" 25 January 1939, RBP MC 005, Box 10, Folder 10: New School.

on Nazi sympathizers, proto-Cold Warriors could applaud its muscular anti-communism, and those scarred by memories of the Red Scare found salvation in its rule of law.<sup>1445</sup>

The common interpretation that Roosevelt's government moved to the right fails to account for Baldwin's warming up to the administration on the eve of war, or the fact that it was the Justice Department and FBI more than the conventionally defined New Deal that won him over. The administration's centralizing investigations against lawlessness gave him hope. In the last months of Cummings' tenure, Baldwin expressed frustration to Jerome Frank that the Attorney General's office's corruption investigations into Puerto Rico ran into obstruction from the governor.<sup>1446</sup> The feature of Murphy's security state most alluring to the ACLU and the activist left was the new Civil Liberties Unit. The Unit signaled that the feds would vindicate civil rights. The ACLU lauded the "new machinery for the protection of labor's rights through the National Labor Relations Act" and similar legislation in several states. Even judicial mandates played a positive role, as "labor injunction laws" and government intervention had yielded "sharp drop in strikes and consequently in fewer violations of civil rights in the industrial struggle."<sup>1447</sup> Jane Addams's progressive dream, of ameliorating class struggle through managerial liberalism, now brought ardent defenders of labor radicalism in league with the strikebreaking security state.<sup>1448</sup> The federal police no longer posed the principal threat to labor, as it had from the Gilded Age through the Red Scare.

The ACLU's gravitation toward the liberal security state coincided with its alienation from other radicals. Geopolitics contributed to the realignment, pitting the forces of totalitarianism against liberal democracy. Baldwin noted that the Nazi-Soviet pact made communism less appealing in America.<sup>1449</sup> Increasingly estranged from communists and hopeful of progress under the New Deal, civil libertarian radicals on the left increasingly found Murphy's liberalism more attractive than that of Cummings. Far from marking a shift toward conservatism, the late New Deal's creation of a security state secured its progressive bonafides.

At the same time, Murphy took disloyalty seriously. An Americanization program of 2,000 citizenship schools instilled dedication.<sup>1450</sup> After the German invasion of Poland, Hoover widened the Detention Index to include citizens and foreigners whose "presence at liberty in this country in time of war or national emergency would be dangerous to the public peace and the safety of the United States government."<sup>1451</sup> As it would turn out, detention of those deemed insufficiently un-American, outside the caring protection of the liberal state, constituted the most conspicuous domestic injustice of the Roosevelt years.

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<sup>1445</sup> Ribuffo argues that the left's solidarity with the administration against the far right helped set up the postwar politics of anti-extremism. Those overly tolerant of foreign totalitarian states became "suspect themselves." Ribuffo, *The Old Christian Right*, 178, 181. The most focused look at the production of this anti-extremist consensus as a construction of Americanism is Wendy L. Wall, *Inventing the 'American Way': The Politics of Consensus from the New Deal to the Civil Rights Movement* (Oxford: Oxford University Press, 2008). Wall does not do much to relate this project the crime and punishment or American liberalism as such.

<sup>1446</sup> Baldwin to Frank, 30 December 1938, JFP Folder 21.

<sup>1447</sup> American Civil Liberties Union, June 1939, HLP Box 211, Folder 3.

<sup>1448</sup> The ACLU's drift toward the New Deal state has been studied in reference to labor politics, but Baldwin's favorability toward strike-breaking seems to mark a major shift on his part. See Paul L. Murphy, *The Constitution in Crisis Times, 1918-1969* (New York: Harper & Row, 1972), 170-171.

<sup>1449</sup> "Should the Dies Investigation Be Continued?" Town Meeting: Bulletin of America's Town Meeting of the Air, Wolcott D. Street Jan 8 1940 Vol 5 No 13, RBP MC 005, Box 22, Folder 1: Race Relations

<sup>1450</sup> "Americanism and the Citizen": American Legion, LPP Box 16, folder 1.

<sup>1451</sup> Theoharis, *Spying on Americans*, 41.

Murphy spent his last months as attorney general lobbying for an FBI that could wage a two-front war against criminals and enemies of the state. When he began the Bureau enjoyed a \$7 million budget.<sup>1452</sup> In September 1939 he requested an additional 150 FBI personnel.<sup>1453</sup> Its new national defense duties included major investigations and protection of America's industrial plants. In 1939, manufacturing infrastructure endured 10,800 explosions and 23,700 fires.<sup>1454</sup> Murphy pointed to plant protection in elaborating on the FBI's expansive needs. He did not want the burdens of national defense to drain resources from crime fighting. Looking ahead to the budget for fiscal year 1941, which would end halfway into 1941, Murphy saw only \$7.444 million allocated for the FBI. This might suffice for peacetime criminal justice, Murphy reasoned, but now the FBI needed another \$1,531,315 and 144 special agents for investigative work, 400 additional agents for emergency defense work, and a reserve item budget of \$500,000 instead of \$200,000. Because of manpower shortages, Murphy estimated a third of the investigative work was left undone.<sup>1455</sup> He negotiated to ensure that the FBI not relent on any front.

In January 1940, the Attorney General who built the liberal security state became an Associate Justice on the Supreme Court. His replacement, Robert Jackson, continued his predecessor's use of criminalization as a weapon to secure the homeland. During the next two years, the architects of security-state liberalism decisively triumphed over those critics, left and right, fearful of the administration's alleged hostility toward constitutional liberties. By December 1941 a liberalized security state emerged, prepared for war with a broad coalition of popular support.

Throughout 1940 the rapid security consolidation continued despite some dissent. One major development brought immigration enforcement, a contentious issue since the 1920s, from the Department of Labor to Jackson's Justice Department. At first Labor Secretary Frances Perkins did not protest the usurpation even as she worried that the Justice Department might mishandle "one of the humanitarian functions of the government." Soon she began to dissent. Opposed to a formal state of emergency after Hitler's invasion of Poland, Perkins warned against the "greater infringement on civil rights and personal freedom." She disagreed strongly with the increasingly exclusionary immigration policy and resisted Hoover's pressure to fingerprint foreigners to estimate their numbers. The State and Justice Departments urged the immigration policy reorganization, which Roosevelt finally implemented in May 1940. Thousands of officials moved to the Justice Department to manage the new responsibility.<sup>1456</sup>

The administration meanwhile laid the groundwork for mass detention. Congress in the summer passed the Alien Registration Act, requiring all foreign nationals to register with the federal government. The Alien Registration Unit, Postal Service, and FBI cooperated to produce a detailed database of each person. The number of files reached 5 million. Meanwhile, Hoover compiled a list of both aliens and citizens subject to arrest in the case of war. The Special

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<sup>1452</sup> Acting Director, Bureau of the Budget, 1 April 1939, OF10b: DOJ FBI 1939

<sup>1453</sup> Roosevelt to Attorney General, 13 September 1939, OF10b: DOJ FBI 1939.

<sup>1454</sup> Pennington, "The FBI's National Defense Program," 21 April 1941, Open Meeting of the Annual Associate Council of United States Daughters of 1812, LPP Box 16, folder 1

<sup>1455</sup> Dear Mr. president, from AG 18 Dec 1939 — OF10b: DOJ FBI 1939

<sup>1456</sup> Batvinis, *Origins of FBI Counterintelligence*, 92–3.

Defense Unit had its own enemies list. The Custodial Detention Index, with thousands of names, was mostly completed in 1940.<sup>1457</sup>

It was an election year, and Roosevelt's national security state faced challenges, many focused on his perceived goal of entering the war. Some worried for civil liberties including the liberties of extremists.<sup>1458</sup> The ACLU criticized Roosevelt for wiretapping in pursuit of "subversive activities."<sup>1459</sup> Whether the targets were Jehovah's witnesses, communists, or German American Bundists, Roger Baldwin warned that "widespread intolerance" imperiled "political democracy itself" and identified an "unprecedented strain on peace-time democracy." In particular he continued to fear "lawless action by mobs, aroused by citizens and local officials."<sup>1460</sup> The "surrender of our liberties in an emergency" posed the great threat, at which point America "would need no Hitler then to conquer us. Totalitarianism would have conquered us from within."<sup>1461</sup>

Indeed, surveillance soon targeted critics of Roosevelt's war mobilization plans. In May, after Roosevelt's sweeping presidential address on national security provoked a slew of dissenting telegraphs, the president asked that J Edgar Hoover "go over these, noting the names and addresses of the senders."<sup>1462</sup> Hoover did so, seeking evidence of more than mere disagreement.<sup>1463</sup> The Bureau crosschecked telegrams and letters with names going back to Hoover's earliest days in anti-subversion, several times detecting names similar to subjects of investigation from World War I and the Red Scare.<sup>1464</sup> Once again a Democratic administration's Justice Department scrutinized suspected Kaiser sympathizers and evaders of Wilson's draft. Through 1940 Hoover kept Roosevelt abreast of these dissenting voices.<sup>1465</sup>

These investigations seldom produced outright repression, in part because the administration balanced its heightened concerns about subversion with restraint. The FBI even leveraged its influence to mediate a new agreement between Dies and Hoover: the ACLU's would purge communists and in exchange HUAC refrained from harassing the organization.<sup>1466</sup> At the same time, the New Dealers and Dies began converging on the foreign threat. Dies, fearing Nazis and communists entering from Mexico, wanted to tighten borders and ramp up deportation. On June 10 Roosevelt concurred that the communist, fascist, and Nazi activities "should not be underestimated," but renounced, at least in name, repression and anti-democratic measures. He had faith in the intelligence triad of the FBI, War Department, and Navy Department.<sup>1467</sup> But the security state's future lay in the convergence among its different strains. Stressing collaboration over confrontation, Dies urged more coordination between the State Department, DOJ, and his

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<sup>1457</sup> Batvinis, *Origins of FBI Counterintelligence*, 94–95.

<sup>1458</sup> Edgar Dale to Marvin McIntyre, 1 March 1940, OF10b: DOJ FBI 1940.

<sup>1459</sup> Batvinis, *Origins of FBI Counterintelligence*, 130–1.

<sup>1460</sup> "Abstract of Speech on National Defense and the Fifth Column," 6 October 1940, Roger Baldwin Papers, MC 005, Box 22 Folder 1: Race Relations.

<sup>1461</sup> Excerpts from Speech by Roger Baldwin, at University of Chicago Law School, 6 June 1940 "National Defense and Civil Liberty," RBP MC 005, Box 22 Folder 1: Race Relations

<sup>1462</sup> Stephen early to J Edgar Hoover, 18 May 1940, OF10b: DOJ FBI 1940.

<sup>1463</sup> Memo to J Edgar Hoover from Rudolph Forster 23 May 1940, OF10b: DOJ FBI 1940.

<sup>1464</sup> Paul W Arndt, Jr, 18 June 1940; Peter Brown, 18 June 1940; Paul Bruno, 18 June 1940; Louis Fagin, 18 June 1940; OF10b: DOJ FBI 1940.

<sup>1465</sup> Graf, Charles, 18 June 1940, OF10b Justice Dept, FBI 1940; Memo to J. Edgar Hoover, 27 May 1940, OF10b: DOJ FBI 1939; Roosevelt to Hoover, 14 June 1940, OF10b: DOJ FBI 1940.

<sup>1466</sup> Gentry, *J. Edgar Hoover: The Man and the Secrets*, 235.

<sup>1467</sup> Dies Hon Martin, 1 June 1940, OF10b: DOJ FBI 1933–1940

own committee. He thought poor communication interfered with fifth-column surveillance.<sup>1468</sup> The administration, in turn, became increasingly vigilant, as Jackson entertained a seven-point program to weed out communists, including a loyalty pledge.<sup>1469</sup>

The heightened resolve against subversion coincided with celebrations of security-state federalism. The International Association of Chiefs of Police praised Hoover.<sup>1470</sup> Pennington warned an American Legion audience in July 1940 that every “good citizen must. . . guard against all subversion” including “Communism, Fascism, Naziism.” The United States had room for “only one ‘ism’—Americanism.”<sup>1471</sup> The FBI’s intelligence network was in full swing, homing in on every threat. A telegraph from a New York City teachers’ union chapter, opposed to the president’s armament plans, traveled up the chain to Hoover.<sup>1472</sup> Congressman Lesinski asked the FBI to investigate someone overheard suggesting that the Germans were better prepared than America.<sup>1473</sup> In August of 1940, a Federal-State Conference convened the governors and state attorneys general through the interstate commission on crime. U.S. Solicitor General Francis Biddle declared that alien control, espionage, sabotage, and subversion would “test our Americanism” and affirmed that “Common defense” relied on the “normal channels of local, state and national law enforcement.”<sup>1474</sup>

Even as the security state consolidated and the rift between Dies and Roosevelt narrowed, civil libertarians warmed up to the security state. Dissent sometimes restrained the administration, such as when Jackson sought to loosen wiretapping restrictions.<sup>1475</sup> More important, the New Deal state itself claimed credit for civil liberties protection. According to Pennington, national security required “the greatest possible public confidence” in law enforcement.<sup>1476</sup> Officials stressed lawfulness in legitimating the Bureau. Indeed, the FBI started enjoying defenses on civil libertarian grounds. R.B. Jordan condemned the campaign against Hoover as “designed to undermine public confidence” and praised the FBI National Police Academy as “the greatest single guarantee that law enforcement will protect civil liberties.” Only “untrained and unprofessional law enforcement officers” could threaten American rights and so the centralizing FBI’s uniform crime reporting, clearing house of data, and technical lab, ensured justice over reckless local vagaries.<sup>1477</sup> Edwin M. Watson depicted the FBI as the principal guardian of freedoms even as the cover of peace receded from the American landscape. As “danger and crisis” brought challenges to “the task of preserving and defending democratic institutions” against corruption and subversion while “scrupulously protecting the civil liberties of law abiding citizens,” America was lucky to have J. Edgar Hoover.<sup>1478</sup>

Roosevelt urged vigilance against both the enemy and misdirected panic at home. He hailed cooperation between governors and state attorneys general “to strengthen our lines of defense.”

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<sup>1468</sup> Dies, Hon Martin, 25 November 1940, OF10b: DOJ FBI 1933–1940.

<sup>1469</sup> Jackson, Hon. Robert, 29 November 1940, OF10b: DOJ FBI 1933–1940

<sup>1470</sup> Edwin Watson to Jordan, 8 March 1940, OF10b: DOJ FBI 1940.

<sup>1471</sup> Pennington, “Citizenship Today,” before American Legion of Ohio, 13 July 1940, Pennington Box 16, folder 1.

<sup>1472</sup> Stephen Early to Hoover, 29 May 1940, OF10b: DOJ FBI 1940.

<sup>1473</sup> Edwin Watson to DOJ, 4 June 1940, OF10b: DOJ FBI 1940.

<sup>1474</sup> Francis Biddle, 31 July 1940, OF10b: DOJ FBI 1933–1940

<sup>1475</sup> Attorney General Jackson to Roosevelt, 9 July 1940, House Resolution 571, Permitting Wiretapping in Certain Cases, 76<sup>th</sup> Congress 3<sup>rd</sup> Session House of Rep Report No 2374, Mr. Celler, 14 June 1940.

<sup>1476</sup> Pennington, “Citizenship Today,” before American Legion of Ohio, 13 July 1940, Pennington Box 16, folder 1.

<sup>1477</sup> Edgar Dale to Marvin McIntyre, 1 March 1940, OF10b: DOJ FBI 1940.

<sup>1478</sup> Edwin M Watson to Mr. Waker, 26 June 1940, OF10b: DOJ FBI 1940

In particular, he championed federal and state legislation to combat “subversive activities, with seditious acts, with those things which slow up or break down our common defense program.” The “common defense,” Roosevelt believed, should bring to bear “the normal channels of local, State and national law enforcement.” The president warned that the “untrained policeman is as ineffective as the untrained soldier,” while hoping that state-level officials would guard against “the prejudice and emotional haste which characterized much of similar legislation during the last world war.”<sup>1479</sup> The new security state was distinctive in its aspirations for both comprehensive scope and lawful stability.

And the ACLU, on the eve of the 1940 election, finally trusted the New Deal security state as a guardian. By October, Roosevelt’s Supreme Court and Justice Department, the historic adversaries of labor and dissenters, had won many of them over. The Justice Department, Baldwin conceded, had enormous new powers. Jackson’s institutional powerhouse could mandate obedience in the Armed Forces. It could criminally prosecute violators of the sedition statutes and America’s first peacetime conscription law, signed by Roosevelt in September 1940. The Roosevelt administration was investigating conscientious objectors and registered Americans with international political connections through the Alien Registration Law. This would spell trouble in the hands of an Attorney General “unsympathetic with civil liberty.” A cruel Justice Department could “stifle criticism and dissent.” But Baldwin trusted “Jackson, whose liberalism is outspoken.” Under his leadership, these awesome powers were “unlikely to be abused.” Baldwin’s optimism had one remaining caveat: war could change everything.<sup>1480</sup>

To his right flank, Roosevelt faced others accustomed to accusing him of abridging constitutional rights. But in the election season Republicans conceded the main premises of the liberal security state. FDR’s opponent Wendell Willkie accused the New Deal state of conflating its own partisan agenda of liberalism with the interests of America. But the Willkie campaign stipulated the core assumptions of New Deal social welfare, arguing that in fact relief should be a “matter of justice,” not simply a prophylactic to stop Americans “from starting a revolution.”<sup>1481</sup> Raymond Moley and Republican gubernatorial candidate Thomas Dewey collaborated on a speech that blamed Roosevelt for inefficient preparation—criticizing both an “astronomical sum voted for national defense,” and America’s lack of “sufficient naval, air or military force to meet a menace on both seaboard”—not so much a difference of principle but a critique of management. The Republicans urged more cooperation with Mexico and Canada, decried the earlier appeasement of Hitler and urged that tax increases rather than debt fund the expanded military. They advocated criminal pursuit of regulatory violators for the sake of security: America needed a “simple mobilizing organization like the war industries board” with “price control over everything.”<sup>1482</sup> Thus Moley and his Republican colleagues conceded the need for a security state, one far removed from the political economy of their 1920s predecessors, even as they called for refinements.

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<sup>1479</sup> Letter to a Conference of Law Enforcement Officials on National Defense, 31 July 1940, APPUCSB.

<sup>1480</sup> “Abstract of Speech on National Defense and the Fifth Column,” 6 October 1940, RBP MC 005, Box 22 Folder 1: Race Relations.

<sup>1481</sup> “The New Deal government likes to play a very neat joke on the American people,” according to a speech on which Raymond Moley consulted. “It is a joke with two parts. The first is to create the impression of a crisis. . . . Then it proceeds to do something that will help it while seeming to help the country.” *The Enemies within the Gate*, RMP Box 217, Folder 20.

<sup>1482</sup> “Draft for Dewey,” 7 October 1934, RMP Box 217 Folder 20.



After his second reelection Roosevelt faced a bipartisan coalition in support of his liberal security state. Notwithstanding his unease with courtpacking, Herbert Lehman was “very happy” about the result. The election of an America on the brink of war soldered the fusion of New Deal liberalism with Americanism. The nation had a “duty to unite all of our forces, all of our energies, all our deepest loyalties, behind our President in defense of America.”<sup>1483</sup> Alf Landon, who had lost to Roosevelt in 1936, now thought it important to “concede that relief can be more honestly and efficiently administered by a federal agency than a local one.” He worried that the atmosphere might devolve into mob rule and someone worse than Roosevelt would one day inherit his awesome powers. At least Roosevelt acknowledged the awesomeness of the powers he claimed, which “cannot be trusted” except to “a people’s government.” The real concern was they might one day “fall into the hands of a Hitler.”<sup>1484</sup> A few months later Landon likewise expressed fear of totalitarianism. He had always worried that fascism “would come from its enemies—the New Dealers—through their heirs, successors and assigns.”<sup>1485</sup> Republican Hil Blackett mused that the strategy against Roosevelt had to focus on the “long-time issue” of constitutional government.<sup>1486</sup> Other Republicans were thankful it was Roosevelt with power, constitutional or not. The real problem with the liberal security state was that it might one day cease to be liberal.



Roosevelt began his third term, in 1941, as he did his first: under pressure to use emergency powers to address a national crisis. S.B. Carr, a District Judge in Texas, pointed to Hitler’s rampage in Europe and Lindbergh’s antiwar extremism at home. He urged FDR to “take over” and “declare martial law, if necessary.” Among the problems were labor strikes. Roosevelt should put strikers “in a concentration camp” if necessary.<sup>1487</sup> Although the liberals running the military did not fully embrace the Texan judge’s most drastic proposal, they agreed with the urgency. Secretary of War Henry Stimpson called strikes more “harmful in their total effect than actual physical sabotage.” The Military Intelligence Division and ONI wanted to prevent them “without detriment to the legitimate bargaining functions of labor,” and petitioned for more power to the FBI to stop them.<sup>1488</sup> Roosevelt himself believed that “Communists and other subversive elements” justified an expansion of FBI’s authority over “subversive control of labor.”<sup>1489</sup> J. Edgar Hoover suggested that subversive speech be suppressed.<sup>1490</sup> And indeed, the FBI was soon charged with checking the loyalty of people within defense organizations, a task moved from the Treasury.<sup>1491</sup> In February 1941 Roosevelt asked Jackson about offering FBI

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<sup>1483</sup> Remarks of Governor Lehman over the Radio, 6 November 1940, HLP Box 263, Folder 5.

<sup>1484</sup> Landon to Moley, 3 December 1940, RMP Box 217 Folder 145.

<sup>1485</sup> Alf Landon to Moley, 8 April 1941, RMP Box 217 Folder 145

<sup>1486</sup> Hil Blackett to Moley, 11 January 1941, RMP Box 217 Folder 14.

<sup>1487</sup> J.E.R. to General Edwin W. Watson, 15 April 1941, OF10b: DOJ FBI 1941–1942.

<sup>1488</sup> Stimpson and Frank Knox to President, 29 May 1941, OF10b: DOJ FBI 1941–1942.

<sup>1489</sup> Memorandum for the Secretary of War and the Secretary of the Navy, 4 June 1941, OF10b: DOJ FBI 1941–1942.

<sup>1490</sup> NH Carlisle to Steve Early, 11 June 1941, OF10b: DOJ FBI 1941–1942.

<sup>1491</sup> Memorandum for Henry Morgenthau, Jr., OF10b: DOJ FBI 1941–1942.

facilities to the Coordinator of Commercial and Cultural Relations between the American Republics to cooperate in “eliminating totalitarian agents” in the organization.<sup>1492</sup>

Security-state federalism continued to bring law enforcement under the federal government’s influence. In February 1941 Pennington reminded local police that the FBI’s lab facilities were available to them, but they should report defense cases without investigating.<sup>1493</sup> A unanimous resolution from the National Police Academy Associates pledged fealty to Roosevelt “as far as National Policy is concerned” and “cooperation to the Federal Bureau of Investigation in coordinating the forces of Law Enforcement in the work of National Defense.”<sup>1494</sup> Roosevelt in turn appreciated the group’s “devotion to the Nation’s welfare.”<sup>1495</sup> Every week the FBI attended conferences with military and Treasury leaders.<sup>1496</sup> By October 1941 security and law enforcement officials attended over five hundred regional conferences.<sup>1497</sup> On the eve of war, the legal community continued to champion the FBI’s war on crime. The president of the Vermont Bar Association hailed the FBI “for the absence of the gangster, for the absence of the kidnaper and for the security of our homes.” The FBI had “restored this country at one time to a basis of law and order in a period when lawlessness was the rule rather than the exception.”<sup>1498</sup>

The New Deal judiciary was also ready to accommodate the security state. Attorney General Robert Jackson retired in August 1941 and joined his predecessor Frank Murphy on the Supreme Court. Two liberal security-state attorneys general now sat on the Court along with Hugo Black, FDR’s surveillance man from the Senate, and four other Roosevelt appointees. Court-packing had proven unnecessary to produce an almost entirely Rooseveltian Court. As Francis Biddle took over as Attorney General, new constitutional interpretations lay in wait to support his power.

As the liberal security state undertook final war preparation, both the labor left and proponents of a new Red Scare could find common ground. Roger Baldwin, the tireless radical critic of bourgeois liberalism, the pacifist imprisoned for dodging Wilson’s war, had evolved in his appreciation. While liberals denied class analysis, he valued them as protectors of the persecuted, the ones who “form the bridge across the chasm” “between the established order” and social reform. The liberals were the translators, ready to “interpret the new to the old.” And liberals especially cherished civil liberties. “Of all the objectives which most readily unite the liberals,” Baldwin wrote, “the fight for civil liberties takes first place.” Moreover, just as the left needed liberals, liberals needed the left. The New Deal was the domestic version of the popular front. It had depended on the “labor and the Left” for its “fighting power.”<sup>1499</sup> Baldwin even came to defend liberals’ “prejudice against Communists,” which was “not unreasonable” even if they were unfairly targeted. He had hope that if the more reasonable radicals of the left joined with the liberal security state, there would be less dissent to suppress. Indeed, voluntary “national

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<sup>1492</sup> FDR to Attorney General, 3 February 1941, OF10b: DOJ FBI 1941–1942.

<sup>1493</sup> Pennington, Address before Banquet of the Fulton Country Police Training School, 18 February 1941,” LPP 16, folder 1

<sup>1494</sup> Thomas W. Ryan, National Police Academy Associates, to Roosevelt, 24 November 1941, OF10b: DOJ FBI 1941–1942.

<sup>1495</sup> MH McIntyre to Ryan, 24 November 1941, OF10b: DOJ FBI 1941–1942.

<sup>1496</sup> Pennington, “The FBI’s National Defense Program,” 21 April 1941, Open Meeting of the Annual Associate Council of United States Daughters of 1812, LPP Box 16, folder 1

<sup>1497</sup> Speech delivered by Lee H Pennington, before Vermont Bar Association, 7 October 1941, LPP Box 16.

<sup>1498</sup> Speech delivered by Lee H Pennington, before Vermont Bar Association, 7 October 1941, LPP Box 16.

<sup>1499</sup> “Liberalism and the United Front,” 1941, RBP MC 005, Box 22, Folder 2.

unity” rather than “enforced conformity” could mean “an emergency without repression.”<sup>1500</sup> Perhaps even a security state at war could withstand the temptation to destroy civil liberties, Baldwin seemed to suggest.

And so Baldwin, unimpressed by the first years of the New Deal, relatively unconcerned about the war on crime, finally became comfortable at the moment when war and repression of dissent, his two greatest fears, became most likely. Murphy, Jackson, and J. Edgar Hoover as much as FDR had won him over, and leftwing patriotism had in turn helped liberalize the new security state. The FBI was eager to conquer the lawlessness within the very infrastructure of repression. The future Cold Warrior Lee Pennington distinguished the new security state from the ways of old. He condemned the World War I “public hysteria” during which “many law-abiding citizens who many have had an accent or a name” associated with foreign enemies found themselves in “Concentration camps upon [bare] suspicion.” He hoped that the American Legion could help stem “mob violence and hysteria.”<sup>1501</sup> Pennington and Baldwin were in agreement. Red-baiters and socialist fellow travelers could unite in this determination against lawlessness and in the name of American values. The FBI and local police, modernized by FDR’s war on crime and accustomed to securing New Deal America from its partisan and illiberal enemies, would uphold law and liberty in the next crusade. The responsible left and right, Democrats and Republicans, all foes of totalitarianism and vigilantism, trusted Roosevelt to lead the way. Shed of their progressive era contradictions, their interwar anxieties of pacifist militarism, the ecumenical liberals of 1941 were finally ready for the repression war would bring.

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<sup>1500</sup> “The Threats to Liberty,” 17 July 1941, RBP MC 005, Box 22, Folder 2.

<sup>1501</sup> Pennington, “Citizenship Today,” before American Legion of Ohio, 13 July 1940, Pennington Box 16, folder 1.

## Chapter 8

### *Trial by Fire*

After Pearl Harbor, as critics to Roosevelt's right joined the military, his left flank also enlisted into the president's project of liberal state-building. Roger Baldwin of the American Civil Liberties Union had spent the interwar years in anxious anticipation for the domestic effects of another international crusade. He never forgot his time in prison for dodging Wilson's draft. His pacifism drove his staunch non-interventionism deep into the late 1930s. Even as he drew closer to Roosevelt's liberalism, Baldwin feared another war would unleash a police state. But soon after Pearl Harbor, Baldwin equivocated on the very meaning of pacifism. As he told the War Resisters League, what they truly opposed was "*participation* in all wars." That did not require neutrality. Pacifists could champion the North in the Civil War. Gandhi himself backed the British in World War I.<sup>1502</sup> Having learned to trust the New Deal Justice Department at peacetime, Baldwin now eyed the liberal state's ultimate test with an open mind, as did many others.

As it turned out, wartime mobilization gave rise to a permanent security state. But how? Two conditions had to hold. First, the institutional groundwork had to be laid. The Justice Department and FBI did this, integrating national defense and local policing to ensure the smooth and sustainable operation of modern technology and to secure nationwide cooperation. Second, the security state had to be less divisive than twenty years before. It needed a broad cultural consensus across partisan, regional, class, and institutional lines. It had to be pragmatic enough for the conservatives and liberal enough for the New Deal's left faction, balancing its vigilance against extremism and its tolerance toward the edges of allowable opinion. The failure to obtain basic political legitimacy brought down Reconstruction, the Red Scare, and Prohibition. Roosevelt won this legitimacy, preparing the integrated mid-century welfare-warfare-police state for its challenges in World War II.

The Second World War clarified what the New Deal war on crime achieved. If in the three years before Pearl Harbor, the war on crime coalition developed into a security state coalition, it was World War II that proved this coalition's potency. If in the same prewar period, war on crime federalism blossomed into security state federalism, World War II vindicated this new structural arrangement. By 1941 the New Deal war on crime satisfied both the institutional and ideological conditions: Roosevelt honed the instruments of repression and refined their relationship to American ideology, building consensus for and liberalizing the security state. The war revealed this refinement, which could boast allegiance from east to west and from left to right.

Historians of both institutions and ideas largely agree that World War II gave rise to a radically transformed state after the New Deal, but they have not emphasized the war on crime in this transformation. Economic historians have long recognized that the legible size and scope of government ballooned in the war, and have generally regarded wartime state building as more significant than New Deal experimentation, at least in quantitative terms.<sup>1503</sup> But such literature on questions of state capacity has not always grappled with the cultural dimensions. Historians of

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<sup>1502</sup> "To the War Resisters League," 27 January 1942, RBP MC 005, Box 10, Folder 24 (emphasis in original).

<sup>1503</sup> See Hugh Rockoff, "World War II and the Growth of the U.S. On the Federal Government," *Japan and the World Economy* 11, Issue 2, April 1999: 245–62;

liberalism have emphasized the ideological development that accompanied state-building, but have generally failed to integrate criminal justice into a coherent story of liberalism's wartime transformation. Alan Brinkley has considered the intertwined arcs of liberalism and government growth, even in relation to repression, yet without much focus on crime and punishment.<sup>1504</sup>

More recent research has explored government expansion and political legitimacy, even gesturing toward the significance of state repression, but usually with a hesitancy to give repression a central role in the story of liberalism. James Sparrow's *Warfare State*, an examination of the qualitative and cultural dimensions to the legitimation of federal power, even touches on some continuities between Roosevelt's criminal justice policies and the war.<sup>1505</sup> Just as Roosevelt used militaristic language to tout the struggle against crime, he extended the metaphor back to warfare. The president used "effective tropes from the New Deal war on crime" and "consistently referred to the actions of Japan, Germany, and Italy as 'criminal,' the work of 'gangsters' and 'bandits,'" Sparrow writes.<sup>1506</sup> And yet Sparrow does not stress law enforcement in teasing out the changing relationship between liberalism and legitimacy from the 1930s through the 1940s, perhaps in part because he wishes to distinguish the welfare state from the security state.<sup>1507</sup> But in the dyadic foundations of the welfare state and security state, the importance of the crime-fighting state is lost.

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<sup>1504</sup> In contrasting World War II's legacy for liberalism with that of World War I, Alan Brinkley considers, among other factors, how repression discredited the Wilsonian coalition. He also looks to the paradox of 1940s economic mobilization, whose successes inspired but whose failures tempered an activist postwar liberalism, and whose geopolitical posture against totalitarianism further cautioned liberals about the dangers of state planning. Brinkley gives serious consideration to how the New Deal both encouraged and constrained the liberals as they moved through World War II. But mostly missing is the role of law enforcement and criminal justice institutions, from World War I and Prohibition through the New Deal and World War II, in constructing new liberal expectations about the state's repressive potential in particular. See Brinkley, "The Two World Wars and American Liberalism," in *Liberalism and Its Discontents* (Cambridge, MA: Harvard University Press, 1998), 79–94. Alonzo Hamby has also noted World War I's negative impact on "the nascent 'Wilson Coalition' of 1916." See Alonzo L. Hamby, "High Tide: Roosevelt, Truman, and the Democratic Party, 1932–1952," in William H. Chafe (ed.) *The Achievement of American Liberalism: The New Deal and Its Legacies* (New York: Columbia University Press, 2003), 21–61, 43.

<sup>1505</sup> James T. Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (New York: Oxford University Press, 2013), examines the interplay between state formation and political culture, focusing on Washington's promotion of political legitimacy (6, 11). Sparrow argues that Roosevelt exploited all three Weberian venues of legitimating authority, the "charismatic, traditional, and rational" (11). Requiring unprecedented national dedication, Roosevelt faced a task "to obscure the statist foundations of public power while insinuating them into the thoughts and lives of the citizenry" (49). The Roosevelt administration deliberately undertook a considerable public relations project, "adapt[ing] imagery and meanings of activist government" from the New Deal to suit the needs of war (21).

<sup>1506</sup> Sparrow, *Warfare State*, 50.

<sup>1507</sup> Sparrow attributes the enduring strength of the repressive state, at the expense of the welfare state, to wartime anti-state racists who had "bolstered the legitimacy of one part of the federal government—the agencies associated with national security—at the expense of the others." Sparrow, 110. Carl Boggs also stresses a sharp division between the welfare and security elements of modern government, emphasizing the war's construction of a "permanent war economy, national security-state, global expansion of military bases, merger of state, corporate, and military power, an imperial presidency, the nuclear establishment, [and] super-power ambitions." In Boggs's formulation, rather than anti-state Americans bolstering the security state, it is the conservatives who represent the true "champions of big government," their "free-market pretensions" a mere matter of "fanciful rhetoric." Boggs does provide some acknowledgement of scholarship showing the decline of "classical liberalism of (relatively) free markets, limited government, local governance, and social autonomy" Boggs, *Origins of the Warfare State: World War II and the Transformation of American Politics* (New York and London: Routledge, 2017), 3, 7, 11. Alonzo L. Hamby, not focused much on the enduring authority of central state enforcement powers, has agreed with the

Indeed, the war on crime, the security state, and a revolution in liberalism all came together in the modern governing experiments that arose during and persisted beyond the war. Examining the state's structural development with a heightened awareness toward qualitative and cultural changes invites an extended consideration of the role New Deal criminal justice powers had in the wartime security state's metamorphic relation to liberalism. The practical necessities of the war—securing the nation at home and abroad—relied heavily on national law enforcement infrastructure that Roosevelt had saved from its precarious fate following the Prohibition decade. In action, this infrastructure arrived just in time for war. Former Attorney General Frank Murphy's goal of an FBI suited for a two-front war, against mundane criminality and enemies of the state, came to life.<sup>1508</sup> The capacity of the wartime regime to prosecute criminals and accused traitors, and maintain martial law in Hawaii and concentration camps for mainland Japanese Americans and Alaska's Aleuts, relied on the earlier New Deal stabilization of the machinery of state violence. On the political side, under Roosevelt liberalism had become so acclimated to the aggrandized capacity for domestic repression that the liberal security state could survive the war despite such infamies as internment. With its unprecedented scope and its polite restraint, its terror and its liberality, the security state's wartime resilience boded well for the future of American power. Security-state federalism and security-state liberalism arose triumphant. In both institutional and ideological terms, World War II demonstrated that the New Deal war on crime had successfully legitimated national enforcement authority.

#### Security State Federalism at War

At the center of the liberal security state's wartime successes was the Bureau of Investigation, which had transformed remarkably in a short time. After an uncertain decade following World War I, the Bureau spent the decade before World War II proving itself. It had proven flexible enough to take on the gangsters. It had proven itself important to local police and surveillance. It had become a tolerable presence in the progressive criminology of "crime prevention." It had moved into the protection of civil rights. It had won over skeptics across American society. The timing of these transformative experiments in law and order was crucial to the effectiveness of wartime governance. The peacetime nurturing of relations between the FBI and local police produced an infrastructure ready for activation during the war. It is questionable that such sophisticated mobilization could have ramped up suddenly had it not been for the groundwork laid by the war on crime.<sup>1509</sup>

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characterization of big government receding after the war. Hamby has identified it as one of World War II's "ironies" that the relatively unscathed American population came out of the war driving the "the greatest backlash against big government and a powerful state." As he sees it the more involved nations required government management of resettlements, rationing, and civilian medical care, "embodying the spirit of national identity." Without such necessity, Americans came out of the war thinking it "justified. . . as an abstract matter" but wondering if the "New Deal state was not too big and too meddlesome." Hamby, "High Tide," 46–47, in Chafe, *The Achievement of American Liberalism*. But while the economic planning state did slow down, the central state's enforcement powers continued to grow.

<sup>1508</sup> See "The Liberal Security State," chapter 7 of this dissertation.

<sup>1509</sup> It took more than a generation of scholarship to reckon with the extent of FBI mobilization before Pearl Harbor. See for example Athan Theoharis, "The FBI and the American Legion Contact Program, 1940—1966," *Political Science Quarterly* 100, No. 2 (Summer, 1985), 271–286.

The wartime FBI was a powerhouse of international, national, and local reach. By the end of 1941, the bureau claimed fifty-five field offices in all forty-eight states.<sup>1510</sup> Inflated from eight years of Roosevelt's war on crime, overseeing local police intelligence, and achieving peer status alongside the ONI and Military Intelligence Division, the FBI also ran U.S. intelligence for the whole western hemisphere. On June 20, 1940, Roosevelt had informally requested that the FBI manage surveillance in the Americas. About a year and a half later, just over two weeks after Pearl Harbor, the new Attorney General Francis Biddle undertook to formalize the arrangement.<sup>1511</sup> On December 23, 1941, Biddle authorized an FBI Special Intelligence Service covering the western hemisphere. All departments and agencies received orders to "clear directly" any such intelligence with the Bureau.<sup>1512</sup> Biddle urged a confidential directive that applied to Mexico, Central America, South America, the Caribbean, and Canada.<sup>1513</sup> One week later Roosevelt directed the State Department, Justice Department, Military Intelligence Division, and ONI to work out the specifics and avoid redundancy.<sup>1514</sup> FDR allowed for some foreign involvement but feared the public backlash should the agencies fall outside domestic control. The president asked Biddle to determine whether the State, War and Navy Departments would allow all foreign government intelligence to fall under the Bureau's "direct control and supervision."<sup>1515</sup>

Indeed, World War II deployed the FBI into international questions of ambiguous jurisdiction. After a civilian seaman attached to an Army Vessel docked in the harbor of Oran, agitated that he was disallowed from inviting a French civilian onboard for lunch, stabbed a night watchman with a butcher knife, it was FBI officials who secured the assailant's sentence upon return to a federal penitentiary.<sup>1516</sup> After nine years of the New Deal war on crime, the FBI stood as the most trusted outfit of American security, now directed toward threats at home and abroad.

At the local, state, and national levels, the war on crime and domestic security state were hard to disentangle. As the FBI escalated its conventional street battle against lawbreakers, security-state federalism provided novel opportunities for coordination and intelligence sharing. In January 1942, Hoover released a comprehensive directive on the national security role of domestic police. The FBI was now "the agency designated by the President of the United States to coordinate police activity in our National Defense effort." Its familiar criminal justice responsibilities combined with important duties in the war against the Axis. The wartime FBI epitomized the New Deal in crime control—it served as the progressive clearing house of information, the investigatory leader, and the authority on enforcement techniques, training, technical analysis, uniform crime reporting, spies, saboteurs, fifth columnists, enemy agents and propagandists. The FBI collaborated with European allies, visiting England to study air raid efficacy. Just as London's police personnel had jumped from 20,000 at peacetime to 35,000 at

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<sup>1510</sup> IC 61-7632, 13 November 1941, Friedrich Ernst Auragen, American Fellowship Forum, Registration Act. LPP Box 3, folder 3.

<sup>1511</sup> Memorandum for the President Re: Intelligence Work in Western Hemisphere, 22 December 1941, OF10b: DOJ FBI 1941–1942.

<sup>1512</sup> Proposed Directive, 23 Dec 1941, OF10b: DOJ FBI 1941–1942.

<sup>1513</sup> Francis Biddle to Marvin McIntyre, 23 December 1941, OF10b: DOJ FBI 1941–1942; McIntyre to Attorney General, 23 December 1941, OF10b: DOJ FBI 1941–1942.

<sup>1514</sup> Memorandum for the Attorney General, Under Sec of State, Colonel Donovan, MID, ONI, 30 Dec 1941, OF10b: DOJ FBI 1941–1942.

<sup>1515</sup> Memorandum for the Attorney General, 13 February 1942, OF10b: DOJ FBI 1941–1942.

<sup>1516</sup> FBI I.C., #45-1923, 14 December 1943, LPP Box 3, Folder 2.

war, so too would American police multiply. The FBI touted its comprehensive training program, some fifty-four civilian defense courses. It recommended educational initiatives on everything from arrest techniques to fingerprints, crime prevention to air raid precautions. The Internal Security Squad of police departments could cooperate with the FBI to ferret out spies and saboteurs. The Bureau affirmed that in wartime “investigations and all other work” caution would ensure “proper, legal and ethical conduct of investigations, thereby maintaining the civil rights of all.”<sup>1517</sup> Withstanding the stress of total war, and indeed thriving on it, the militarized FBI would secure liberalism.

In the 1940s the New Deal FBI finally achieved its 1930s aspirations toward local crime. As much of the world burned, the streets of the United States became a laboratory of new frontiers in local-federal cooperation. The promise that security-state federalism would assist in the most pedestrian of criminal investigation and enforcement crucially contributed to building a sustainable defense infrastructure. The FBI recognized the importance of neighborhood-level support, and touted the most granular of triumphs over criminality even as American pilots endured apocalyptic battles on the islands of Japan. The FBI touted its scientific forensics for bringing justice to perpetrators big and small. Its leaders took pride in its local impact, hailing a National Police Academy graduate for catching an arsonist in Michigan.<sup>1518</sup> Its lab experts and expert testimony proved especially helpful in hit and run offenses from North to South Carolina and beyond.<sup>1519</sup> Fiber evidence could secure convictions of reckless drivers.<sup>1520</sup> Confronting a murderer with blood stains, soil samples, and FBI lab results could elicit confession.<sup>1521</sup> Forensic evidence extracted an admission of guilt in the case of a gruesome attack on a twelve-year-old girl.<sup>1522</sup> The FBI lab helped solve a prison murder case in Memphis, Tennessee.<sup>1523</sup> Sometimes investigations of petty crimes revealed larger offenses: a drunken driver caught in May of 1943 turned out to be an escaped convicted murderer.<sup>1524</sup>

Fingerprint intelligence proved especially fruitful. Memos reporting these successes became routinized, repeating the same line about the “value of fingerprinting in identifying victims in traffic accidents,” even in reference to an airplane crash.<sup>1525</sup> Fingerprints identified repeat offenders. It turned out one man arrested in Indiana as a vagrant, sentenced to one to eighteen years for grand larceny, paroled in 1941 and sentenced to another five, had earlier been arrested in 1915 and 1919.<sup>1526</sup> A fingerprint on a Lugar pistol helped convict a murderer in Georgia.<sup>1527</sup> And the FBI’s interest in local policing and fingerprints extended abroad. J. Edgar Hoover boasted the international utility of FBI fingerprinting networks as evidenced by a suspect

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<sup>1517</sup> “War Duty Suggestions for Police Executives,” Prepared and Issued by the Federal Bureau of Investigation, United States Department of Justice, J.E. Hoover, January 1942.

<sup>1518</sup> NPA Graduate Catches Arsonist in Michigan, 7 October 1944, LPP Box 3, folder 3..

<sup>1519</sup> Expert Testimony Helps Convict Hit-and-Run Driver, 25 May 1943, LPP Box 3, folder 3.

<sup>1520</sup> IIL 162, 31 July 1943, Fibers Convict a Hit-and-Run Driver, LPP Box 3, folder 3.

<sup>1521</sup> Murderer Confesses when Confronted with Results of Laboratory Analysis of Blood Stains and Soil Samples, 12 April 1943, LPP Box 3, folder 3.

<sup>1522</sup> I.I.L. #155, Firearms Identification Assists in Obtaining Admission of Guilt Just Before Trial, 8 June 1943, LPP Box 3, folder 3.

<sup>1523</sup> IIL #145, 24 March 1943, LPP Box 3, folder 3.

<sup>1524</sup> Drunken Driver Identified as Escaped Murderer, 23 July 1943, LPP Box 3, folder 3.

<sup>1525</sup> Fingerprints Identify Aircraft Victims, 9 November 1934, LPP Box 3, folder 3.

<sup>1526</sup> II 497 Applicants Extensive Record Revealed by Prints, 19 October 1943, LPP Box 3, folder 3.

<sup>1527</sup> Fingerprint of Trigger Convicts Georgia Murderer, 11 December 1943, LPP Box 3, folder 3.



arrested by the “Metropolitan Police of Scotland Yard.”<sup>1528</sup> Overall, in 1943 the FBI found fingerprint matches in 64.68% of its cases, and by 1944 boasted a repository with 78,916,494 prints, nearly one hundred times as many as it had two decades earlier.<sup>1529</sup> Sometimes the method brought not only justice but closure. Fingerprints helped the Alabama Highway Patrol identify a deceased soldier.<sup>1530</sup>

New Deal gun control had its most convincing trial in the wartime security state. Homer Cummings had stressed that the pervasiveness of firearms and their relationship to crime as a whole were national problems, and the national usefulness of firearms legibility and tracking became more apparent during the war. The use of firearms databases to address everyday crimes became a convincing legacy of the New Deal FBI. Firearms forensics also proved effective. FBI firearms tracking finally solved a case that eluded officials for two years in Alton, Illinois.<sup>1531</sup> Firearms tracing helped catch K.W. Williams, who escaped from a prison camp in Bassett, Virginia, and went on an interstate crime spree that took a life.<sup>1532</sup> Ballistic examinations helped secure life imprisonment for a convicted killer in Akron, Ohio.<sup>1533</sup> FBI identification of firearms resulted in an electric chair sentence and life imprisonment for “two negro boys” who robbed a business in November 1942 in Columbus, Ohio, resulting a death.<sup>1534</sup> Security-state federalism could empower local law enforcement, replicating any local prejudices.

Meanwhile, the interstate logic of the 1930s war on crime continued to drive federal enforcement. The FBI continued in its first major mission going back to the 1910s, the prosecution of the Mann Act against human trafficking. New legislation extended its authority in January 1941 and in fiscal year 1943 the FBI could take credit for 751 convictions.<sup>1535</sup> Armed with the White Slave Traffic Act, the FBI captured Ellen Lucille Moore, “notorious madam of Fargo, North Dakota,” also known as “Big Lou.” The security state tracked Big Lou as she went to Minneapolis attempting to procure sex workers for her home in Fargo.<sup>1536</sup> The federal government also pursued interstate violations of laws against lotteries, busting four rival lottery syndicates that distributed millions of tickets.<sup>1537</sup> An FBI Field Division, using the Federal Extortion statute and forensic methods on a threatening letter, nabbed George Baker who, desperate for money to pay for trade school, threatened to kill singer Bing Crosby.<sup>1538</sup>

In addition to assisting local officials and pursuing interstate criminals, the FBI now led the effort against those who obstructed the war effort. In particular, criminal investigation and enforcement targeted fraud, sabotage, espionage, subversion, and treason. The FBI took notice of

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<sup>1528</sup> II #499, English Given Record on American Criminal, 9 November 1943, LPP Box 3, folder 3.

<sup>1529</sup> Pennington, “Citizenship Today,” before American Legion of Ohio, 13 July 1940, Pennington Box 16, folder 1.

<sup>1530</sup> Deceased Soldier Identified by Fingerprints II 489, 7 April 1943, LPP Box 3, folder 3.

<sup>1531</sup> IIL 151, Federal Bureau of Investigation Assists in Solving ‘Perfect Crime,’ 13 May 1943, LPP Box 3, folder 3.

<sup>1532</sup> II L-160, Microscopic Analyses Convict Murderer, 10 June 1943. Pennington Box 3, folder 3.

<sup>1533</sup> IIL, #148, 28 May 1943, Life Imprisonment Given to Young Murderer as Result of Ballistics Examination, LPP Box 3, folder 3.

<sup>1534</sup> II #156, Murderer Sentenced to Electric Chair, Accomplice to Life Imprisonment as Result of FBI Identification of Firearms, 3 July 1943, LPP Box 3, folder 3.

<sup>1535</sup> Address of L.R. Pennington, Southeastern Regional Conference of Social Hygiene, “The Challenge to Law Enforcement,” 23 February 1944, LPP Box 16, folder 1.

<sup>1536</sup> FBI I.C., #31-67289, 14 December 1943, LPP Box 3, folder 2.

<sup>1537</sup> I.C. 71-1630; 71-1677; 71-1594, 15 January 1944, LPP Box 3, folder 3.

<sup>1538</sup> #9-9370, Samuel Rubin; Bing Crosby; Harold Lloyd, 12 November 1942, LPP Box 3, folder 3.

bankruptcy racketeering—financial crimes and frauds—even before the war.<sup>1539</sup> The pursuit of those accused of financially exploiting the war effort perfectly represented New Deal economic justice, a sword forged in the fires of struggle with crime and sharpened by the trials of the Second World War. The FBI investigated a woman in Buffalo, New York, dressed as a nurse soliciting money on behalf of the administration to fund furloughs of men stationed abroad.<sup>1540</sup> FBI agents also sent men to prison for dodging military service. They investigated Arturo Bernardo Vela in Texas, a Notary Public, for charging people to administer oaths and gouging Mexican registrants to fill out Selective Service forms.<sup>1541</sup> The FBI laboratory uncovered a fraudulent use of a typewriter by George Ross of Washington, Virginia, who faked his age to avoid conscription. His wife, a Selective Service board member, paid a price.<sup>1542</sup> Walter Alvin Johnson of Laredo, Texas, was investigated for ingesting pills procured from a doctor in Mexico to raise his blood pressure and avoid Selective Service.<sup>1543</sup> Such investigative precision arose thanks to the FBI's ubiquity.

Coordinating with other agencies in the New Deal state, the FBI disciplined Americans into patriotism, barring known criminals from sensitive or esteemed wartime positions. The Civil Service Commission sent the FBI the fingerprints of an applicant for a position as steward's storekeeper with the War Department. The person had been arrested for larceny in Jacksonville in 1917. A fugitive from Miami, he served three years in 1920 for embezzlement, had forgeries in 1927 and 1927 in Texas and Louisiana, got arrested in 1937 and 1940 for drunkenness and in 1942 for "disloyalty in the Naval forces."<sup>1544</sup> Another applicant lost an Air Corps position after his fingerprints turned up a past embezzlement.<sup>1545</sup> Fingerprints also caught escaped war prisoners.<sup>1546</sup>

In addition to profiteers, dodgers, and those unfit to serve, the bureau focused on the more nefarious obstructionists—spies and saboteurs. On the eve of war, the conviction of Michael William Etzel in federal court in Baltimore, for damage to aircraft, became the first FBI sabotage investigation to detect a motive "clearly to prevent the United States from furnishing aid to countries who are at war with Germany." This 22-year-old blamed the German government for war but did not want to see the German people suffer. He received a fifteen-year sentence in November 1941.<sup>1547</sup> In 1942 the Justice Department took over administration of the Foreign Agents Registration Act, a 1938 law that originally mandated State Department registration by those engaged in a "political of quasi-political capacity" with foreign institutions. The Registration Act caught a man of Austrian descent who served as a Japanese agent.<sup>1548</sup> Sometimes those with German American Bund connections were caught propagandizing on behalf of the Nazis.<sup>1549</sup> One man was caught sharing US Army Ordnance Depot blueprints,

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<sup>1539</sup> FBI, IC #49-9956, 30 November 1943, LPP Box 3, folder 2.

<sup>1540</sup> FBI, IC #47-30025, 9 November 1943, LPP Box 3, folder 2.

<sup>1541</sup> FBI I.C., #25-96330, 20 January 1944, LPP Box 3, folder 3.

<sup>1542</sup> Lotis Florine Ross, 30 September 1944, LPP Box 3, folder 3.

<sup>1543</sup> I.C. #25-248512, 7 September 1944, LPP Box 3, folder 3.

<sup>1544</sup> II 498, Embezzlement, Forgery Record Revealed by Fingerprints, 19 October 1943, LPP Box 3, folder 3.

<sup>1545</sup> IIL #167, Application for Government Position, 23 September 1943, LPP Box 3, folder 3.

<sup>1546</sup> Body in River Identified as Escaped War Prisoner, 30 October 1944, LPP Box 3, folder 3.

<sup>1547</sup> IC 98-4819, Michael William Etzel, Glenn L Martin Company Sabotage, 1 December 1941, LPP Box 3, folder 3.

<sup>1548</sup> #65-39300, 19 February 1944, LPP Box 3, folder 3.

<sup>1549</sup> IC 100-30234, 12 October 1944, LPP Box 3, folder 3.

plans, and data with foreigners.<sup>1550</sup> John da Silva Purvis, born in Portugal and in the United States on and off since 1920, had conspired to violate the espionage act and communicate with German intelligence, sharing maps of New York City. He received a ten-year sentence.<sup>1551</sup>

Many attacks on infrastructure qualified more as idiosyncratic criminality than anti-American espionage. The FBI often suspected arson as sabotage, soliciting the Forest Service to investigate a fire in DeSoto National Forest, in Greene County, Mississippi, yielding suspended jail time and probation for a 23- and an 18-year old.<sup>1552</sup> The 1940 Federal Train Wreck statute targeted saboteurs whose sundry motives counted as reckless frivolity rather than fascist sympathy. This distinction did not spare James Howard, a seventeen-year-old African American, from a sentence of three years and eight months for obstructing a railway to see if the Missouri Pacific Railroad would jump off its tracks.<sup>1553</sup> Everyday suspects sometimes blamed Nazis for their offenses, with mixed success. After claiming a Nazi sympathizer hired him to place rocks and detonators along the Florida East Coast Railway, a man finally confessed to having no accomplices and faced a four-year sentence in a federal penitentiary.<sup>1554</sup>

The line sometimes blurred between radical protest and obstruction. The FBI worried about the peace movement of Ethiopia for its “anti-white attitude and pro-Japanese sympathy” and “plan for the resettlement of negroes in Africa modeled upon the program of the Universal Negro Improvement Association.” Asians allegedly appeared in Chicago meetings, encouraging blacks to return to Africa.<sup>1555</sup> The FBI feared the Pacific Movement of the Eastern World, “another Negro organization” founded through Naka Nakane, a Japan sympathizer who modeled operations after the Universal Negro Improvement Association. Although calling themselves a Back to Africa movement, they allegedly pushed propaganda to resist the war program. The FBI investigated such efforts in St. Louis, Kansas City, Cincinnati, Philadelphia, and New York City.<sup>1556</sup> But far fewer people found themselves locked up for disloyal thoughts or actions than in the last world war.

Treason is the gravest of federal criminal offenses. The Constitution explicitly mentions it along with few other crimes. Fittingly, the New Deal state successfully prosecuted the first U.S. treason offense since the Whiskey Rebellion in the 1790s. A coordinated effort caught Max Stephan. Born in Besighen, Germany, in 1892, Stephan sustained injuries and worked as a censor of soldiers’ correspondence in World War I, resigned as a police officer and moved to Quebec in 1928. With his wife he opened a restaurant that ran afoul of Canadian liquor law, and moved to Detroit in 1933. The couple mischaracterized their intentions and history of living permanently in the United States and became American citizens in 1935. During the war Stephan asked a woman acquaintance to assist German prisoners of war in Canada on his behalf. This request benefited Hans Peter Krug, a young German pilot shot down and transferred from Britain to a Canadian internment camp, which he escaped only to encounter Stephan’s Canadian acquaintance, who sent him to Margareta Johanna Bertelmann in Detroit. After a short time at a Toronto social welfare agency Krug fashioned an oar out of old lumber and made his way to

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<sup>1550</sup> I.C. #65-40673, Herman Tracy Green: Espionage: 3 June 1942, LPP Box 3, Folder 3.

<sup>1551</sup> John Da Silva Purvis, with Aliases, Espionage – O, 22 December 1943, LPP Box 3, Folder 3.

<sup>1552</sup> I.C. v98-17301, 29 May 1943, LPP Box 3, folder 3.

<sup>1553</sup> ICC 98-7719, James Howard, with alias Brother, 2 June 1942, LPP Box 3, folder 3.

<sup>1554</sup> I.C. #98-6354, Stokes McCreay, Florida East Coast Railway Sabotage, 2 June 1942, LPP Box 3, folder 3.

<sup>1555</sup> Peace Movement of Ethiopia, TC 100-124410, 23 October 1943, LPP Box 3, folder 3.

<sup>1556</sup> IC #65-40879, 8 September 1943, LPP Box 3, folder 3.

Detroit where Bertelmann introduced him to Stephan. The two men celebrated Krug's birthday with beer and German food, after which the young airman took the bus to Chicago, then Columbus, New York, Philadelphia, Harrisburg, Cincinnati, Louisville, Memphis, Dallas, and San Antonio. Suspicious of Krug, the hotel keeper at San Antonio called the FBI.<sup>1557</sup>

The Max Stephan investigation was a triumph of security-state federalism. Through its network of agents and coordinated intelligence with Canada, the FBI pieced together a detailed account. It launched investigations of Krug, Bertelmann, Stephan, his friend Theodor Danay, a German sympathizer known for condemning FDR and authoring an anti-Semitic version of "Silent Night, Holy Night." The FBI also investigated Stephan's wife Agnes, known for her "un-American statements" and saying Hitler would run America "much better." Krug's colorful personality emerges from the FBI's textured documentation. When asked where he got his pants Krug responded it was a "military secret." When asked if the distinction "between pants and underwear. . . constitutes a military secret," Krug responded, "of course . . . . You can't walk down the street in your underwear." The young German escaped Canadian prison authorities a second time on August 2, 1943, before being recaptured. Stephan and his American collaborators failed to elude the authorities. They all faced wartime justice. Thomas Donay was sentenced to prison for six and a half years. Max Stephan himself was convicted and sentenced to death. In the first federal treason conviction since the 1790s, Roosevelt showed leniency but not as much as George Washington, who pardoned a Whiskey Rebel. Roosevelt commuted Stephan's sentence to life in prison. It was a *liberal* security state.

### War Liberalism

But *how* liberal was the security state? Remarkably liberal, according to the ACLU's Roger Baldwin. Within two years of war he concluded that the "prophets who foretold the collapse of democratic liberties. . . have been confounded by the extraordinary record of war-time freedom." Federal censorship of speech and print had "been administered with an easy hand," with only 83 imprisoned for their utterances.<sup>1558</sup> White supremacy posed a continuing problem, but now Baldwin invoked Roosevelt's own language on behalf of civil liberties, aspiring to a "world which squares with the Four Freedoms, the Atlantic Charter, and the other democratic ideals."<sup>1559</sup> Baldwin's optimism withstood the worst wartime injustices. In particular, Japanese internment qualified as "the greatest blot" on the government's "record of general sanity and tolerance."<sup>1560</sup> Baldwin thought it "plain to reasonable people" that the president's evacuation orders "went far beyond military necessity," and the subordination of whole areas "under the army's control" lacked "precedent in law and policy." Even here, Baldwin tried to look on the bright side. He was glad challenges to the internment law found their way in the judiciary.<sup>1561</sup>

Putting aside for the moment the enormity of internment, Baldwin in ways exaggerated the wartime regime's restraint. The liberalism of World War II built the largest engine of American

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<sup>1557</sup> I.C. #39-1150, 31 December 1943, Max Stephan; Theodore Donay, LPP Box 3, folder 3.

<sup>1558</sup> "American Liberties in War-Time," 11 October 1943, RBP MC 005, Box 22 Folder 1: Race Relations.

<sup>1559</sup> "For the Pacific Citizen" 7 Dec 1943, RBP MC 005, Box 22 Folder 1: Race Relations.

<sup>1560</sup> "For the Pacific Citizen" 7 Dec 1943, RBP MC 005, Box 22 Folder 1: Race Relations..

<sup>1561</sup> "The Evacuation of Citizens and the Law," Baldwin, July 1942, RBP MC 005, Box 22 Folder 1: Race Relations.

repression in U.S. history, at least as measured by capacity.<sup>1562</sup> Besides the American citizens of Japanese descent, the United States scrutinized 890,000 “enemy aliens” in the course of the war, although the government cleared the bulk of them, 600,000 Italian nationals, before the end of 1942.<sup>1563</sup> Throughout the war, prosecutions of espionage and sedition far exceeded some of the romantic postwar estimates.<sup>1564</sup> Constant strikebreaking and the compelled, often fatal, service of millions of conscripts characterized the warfare state.<sup>1565</sup> The effective and relatively smooth enforcement of martial law in Hawaii and Japanese internment would have been unthinkable in past eras.

The liberal security state extended to the maintenance of the wartime political economy, which used both social pressure and governmental policing at all levels. The wartime New Deal enforced its economic controls with a relatively light touch, but in the process massively built the capacity for repression. Forty percent of GDP was bound up with the war effort. World War II introduced a slate of price controls, yielding the high point of rationing in all of U.S. history.<sup>1566</sup> The War Department had anticipated wartime economic regimentation even before the war.<sup>1567</sup> In January 1942 the Emergency Price Control Act established four mechanisms of enforcement—injunctions, license suspensions, treble damages, and criminal proceedings to take place in federal courts. Starting in September 1943, the Office of Price Administration had a dedicated Enforcement Department, whose thousands of investigators and hundreds of attorneys accounted for 11.6 percent of the total OPA budget by 1945.<sup>1568</sup>

Despite limited criminal enforcement, price controls introduced new frontiers in crime and criminology. New black markets arose in response to the rationing, as counterfeiting money plummeted and the easier crime of counterfeiting ration currency proliferated. In part because violation was so rampant, most offenders escaped criminal penalty. An investigation of businesses in 1943 found 57% of them to be in violation.<sup>1569</sup> Of the 333,151 cases investigated in 1943 under the OPA, only an estimated 9,260 yielded criminal prosecutions, although offenders sometimes found themselves prosecuted under other statutes like the Second War Powers Act or, in rare cases, by local government, particularly in New York City—the localized paragon of security-state federalism mobilized against black markets. Generally, however, officials did not

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<sup>1562</sup> By the 1980s, researchers of declassified archives were questioning the earlier characterization of the wartime regime as liberal except for Japanese Internment. “The World War II period was not devoid of serious restrictions on civil liberties. Nor was President Franklin D. Roosevelt a committed civil libertarian,” Theoharis explains in “FBI and the American Legion Contact Program,” 272.

<sup>1563</sup> See Geoffrey Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: WW. Norton & Company, 2004), 279–80.

<sup>1564</sup> Compare, for example, Harold M. Hyman, *To Try Men’s Souls: Loyalty Tests in American History* (Berkeley: University of California Press, 1959), to Robert Justin Goldstein, *Political Repression in Modern America from 1870 to 1976* (Urbana: University of Illinois Press, 2001). On the way sedition prosecutions arguably aimed to silence legitimate critics of Roosevelt, see Ribuffo, *The Old Christian Right*, 194–95.

<sup>1565</sup> On government crackdowns on labor see Rosa L. Swafford, *Wartime Record of Strikes and Lockouts, 1940–1945* (Washington: Government Printing Office, 1946). On conscription see John O’Sullivan, *From Voluntarism to Conscription: Congress and Selective Service, 1940–1945* (New York: Garland, 1982).

<sup>1566</sup> Hugh Rockoff, *Drastic Measures: A History of Wage and Price Controls in the United States* (Cambridge: Cambridge University Press, 1984), 139–40.

<sup>1567</sup> Marshall B. Clinard, *The Black Market: A Study of White Collar Crime* (New York: Rinehart & Company, 1952), 3.

<sup>1568</sup> Rockoff, *Drastic Measures*, 141–142.

<sup>1569</sup> Clinard, *The Black Market*, 23, 37.

regard offenses against price controls as “criminal,” which some scholars have attributed to classist discrimination.<sup>1570</sup> Nevertheless, some contemporary criminological theorists dissented from this de facto standard. Writing in the early 1950s, Marshall Clinard argued that even violations pursued outside of criminal statutes could “be considered sociologically as a ‘crime,’” and found that the wartime enforcement against black market activity contributed to the acceptance of Sutherland’s formulation of “white-collar” crime.<sup>1571</sup> Potentially, at least, wartime economic regulation, ubiquitous lawbreaking, and selective enforcement introduced the potential for a labyrinthine leviathan with extensive and arbitrary power over the American individual.

But war liberalism—the wartime consummation of the security-state liberalism that had brought Baldwin toward FDR in the years before and during World War II—was not simply a question of state power and individual rights. Perception mattered as much as reality, and lawful order as much as abstract justice. Broad public support made the war a more palatable, predictable regime than what Baldwin remembered from Wilson’s war and Palmer’s raids. Repressing lawlessness became the liberal state’s main defense against accusations of repression. By conquering lawlessness within the infrastructure of repression, America could express its commitment to law and liberty—the Four Freedoms—and thus its wartime repression would be done in service of this active liberalism. In his last State of the Union address, Roosevelt touted the United States as an international model for overcoming its original sin of anarchy. Roosevelt quoted historian Albert Hart’s view that the American Revolution had “left behind. . . ‘an eddy of lawlessness and disregard of human life.’” For many years, FDR explained, separatist movements and insurrections threatened the national cohesion necessary to tackle this lawlessness. But now the United States was truly united, dedicated to liberalism and law, devoted to the global pursuit, where “humanly possible,” of “the fulfillment of the principles of the Atlantic Charter.”<sup>1572</sup> The selective affirmation of universalism, stability and legitimacy, the triumph of a polite regimentation over vigilante collaboration, made the security state liberal.

Universalism through state security faced a major test and forced the issue of racism further forward within the state-building construction of Rooseveltian liberalism.<sup>1573</sup> The New Deal state’s contradictory management of racial issues, as mediated through war on crime federalism, did not always suffice at wartime.<sup>1574</sup> Even as black Americans joined the struggle against the Nazis, the paradoxes of Jim Crow America became all the more conspicuous. African-American soldiers faced discrimination and lynchings. Racists beat a black army nurse for violating the color line on a Montgomery bus.<sup>1575</sup> Meanwhile, Roosevelt’s political coalition was moving from the South to the urban north.<sup>1576</sup>

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<sup>1570</sup> Rockoff, *Drastic Measures*, 141–143.

<sup>1571</sup> Clinard, *The Black Market*, 227–228.

<sup>1572</sup> State of the Union, 6 January 1945, UCSB APP.

<sup>1573</sup> William H. Chafe has called race the “ultimate test of Liberalism,” and has argued that if blacks saw gains in the 1930s it was “Only by contrast with what had gone before.” William H. Chafe, “Race in America: The Ultimate Test of Liberalism,” in Chafe, *The Achievement of American Liberalism*, 161–179, 162.

<sup>1574</sup> See “The War on Crime Constitution,” chapter 6 of this dissertation.

<sup>1575</sup> Chafe, “Race in America,” 163, in Chafe, *The Achievement of American Liberalism*.

<sup>1576</sup> World War II moved the coalition’s center to the north. “Roosevelt could not have been reelected in 1940 and 1944 without his overwhelming urban majorities; in both cases, he would have won without a single electoral vote from the South,” Hamby, “High Tide,” 40, in Chafe, *The Achievement of American Liberalism*.

The problem of racism posed law-enforcement challenges to war liberalism as well as security-state federalism. Policing the Zoot Suit rioters tested the liberal security state in both its institutional and ideological composition. In Los Angeles, the Mexican-Americans wearing Zoot suits, complete with large jackets and padded shoulders, evoked the jazz stylings of black America. They flouted the conventions of wartime rationing, donning elaborate attire that conspicuously exceeded the limited allotment of cloth.<sup>1577</sup> Throughout 1942 tensions rose as police arrested hundreds of young Americans targeted for their clothing. In 1943, after a jury convicted a dozen Zoot suit wearers of murder, hundreds of soldiers and sailors from across the country rampaged through Mexican-American neighborhoods, brutalizing those found in the offending garb.

The structural tensions outlined the relationship between institutions and ideology. The offended sailors were in a way a throwback to an earlier era of international war. They were vigilantes, policing not just a racial order but the commitments to austerity of a wartime regime run by the New Deal Democratic Party. The mostly white sailors returning to California were outraged about the challenges to whiteness, to masculinity, but also to Rooseveltian political economy. The local police in large part aided the white sailors—a sort of spontaneous convergence in vigilante violence conducted by both local and federal enforcement agents on the public payroll.<sup>1578</sup> But the official rebuke from Washington was louder than anything from the feds in reining in the vigilante enforcement of World War I. The Army and Navy cooperated with city authorities to contain the violence.<sup>1579</sup>

In ideological terms, the Zoot Suit crisis tested the racial politics of war liberalism. The racialized murder trial in January 1943 caught the attention of the administration, which hoped through its Good Neighbor Policy and through World War II to maintain smooth relations with Mexico and Latin America. The rioting white sailors were enforcing not just wartime rationing but the sort of white supremacy that for the most part the New Deal had managed through war on crime federalism. But in this case the cooperation with the local elements of racism were not in the south, but in the west, and the cooperation did not enjoy the endorsement that the New Deal state had afforded to Jim Crow law and order. In response to the violence, the aspirationally colorblind Roosevelt administration lamented the racial dimension but did not see the racist motivation as actionable. Eleanor Roosevelt's take was more attentive to the racial angle of repression. She blamed the violence on "the attitude toward Mexicans in California and the States along the border."<sup>1580</sup> The Los Angeles Times struck back that the violence found provocation in "the weird costumes worn by the gangsters, who have included many racists" and accused the First Lady's emphasis on race of having an "amazing similarity to the Communist party line."<sup>1581</sup> Whereas in the past, national politicians downplayed racism even in criticizing local oppression, now national voices of condemnation were explicit in opposing racism, even as defenders of the oppression insisted the violence was colorblind.

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<sup>1577</sup> See Stuart Cosgrove, "The Zoot Suit and Style Warfare," in A. McRobbie (eds.) *Zoot Suits and Second-Hand Dresses: Youth Questions* (London: Palgrave Macmillan, 1984), 3–22.

<sup>1578</sup> See Los Angeles Committee for American Unity, "Investigations of the Los Angeles Committee for American Unity," 11 June 1943, reprinted in Kevin Hillstrom, *The Zoot Suit Riots* (Detroit: Omnigraphics, 2012), 172–74.

<sup>1579</sup> Robert Bruns, *Zoot Suit Riots* (Santa Barbara, Denver, and London: Greenwood, 2014).

<sup>1580</sup> "First Lady Traces Zoot Riots to Discrimination," Associated Press, 17 June 1943.

<sup>1581</sup> "Mrs. Roosevelt Blindly Stirs Race Discord," *Los Angeles Times*, 18 June 1943.

The FBI also struggled to maintain this sense of blind justice. Along with its relative restraint, the FBI's adoption of universalism marked a difference with the World War I experience. Hoover's Bureau of Investigation wanted to avoid the perception of ideological bias. He disputed claims that his Bureau cared more about the radical left than the fascist threat. Hoover noted that no communists had endured sabotage convictions since July 1939. He conceded that within the U.S. government, communist rather than fascist loyalty drew attention because Martin Dies provided lists of suspects. But when the Bureau, under a strain of resources, tried to scale back its scrutiny of war agency employees, it was Roosevelt himself who insisted they keep up forty investigations per week.<sup>1582</sup>

In war J. Edgar Hoover decried the enemy within while cautioning against blanket racism. Hoover detested the "Munich-minded men" who had to be "forever quarantined." But although "free speech" was the "incomparable fruit of democracy," and should not become "a meaningless mockery," and although Hoover would have preferred violating "a few Quislings and potential Fifth Columnists" over putting "millions in a state of unendurable slavery," the FBI chief's condemnation of Nazi sympathizers had a corollary, American universalism, which allowed no place for naked bigotry. As Hoover put it, a "horde" of Americans had adopted the "the deadly infection of anti-Semitism." Their "Axis line" and propaganda "exceeded the lies of a Geobells." But patriotic immigrants, on the other hand, strengthened America. The United States "became great because it fused into one great melting pot the best of old world culture, seasoned by the conditions of a young and vigorous Nation." The "children of parents born abroad" gave "structural and virile strength" to the country, and only "a few of them lack the qualities essential in a real American." It was therefore the duty of "every red-blooded American. . . to protect and aid the foreign-born whose character of Americanism puts to shame many of our native citizens."<sup>1583</sup>

This American universalism required the suppression of vigilantism. Hoover identified the enemy as "lawlessness" and those who refused to "obey" laws, and that included those who would lawlessly oppress foreigners. Indeed, according to J Edgar Hoover, "Oppression of sincere liberty-loving aliens is one sure way to develop a Fifth Column." Thus Americans "must be vigilant, but not vigilantes."<sup>1584</sup> Hoover's opposition to vigilante justice extended to his regard for the problem of enforcing conscription. The American Legion assisted the liberal security state in bringing in 15,000 alien enemies and also in pursuing draft dodgers, but unlike the American Protective League's sloppy collaboration with the Wilson administration, which had temporarily deprived the liberty of nearly a hundred thousand people innocent of draft dodging, the process in World War II was both more effective and more lawful. Hoover boasted 7,000 convictions but more important 135,000 became "available to the Armed Forces" thanks to the Legion's cooperation.<sup>1585</sup>

The wartime marginalization of the FBI's critics only further normalized its vast power and harmonized it into the liberal state. High-profile calls to scrutinize the bureau met opposition for politicians and law enforcement. New Deal Republican Senator George W. Norris of Nebraska, one of the most dedicated New Dealers, a chief architect of the Tennessee Valley Authority, had

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<sup>1582</sup> 2 June 1942, OF10b: DOJ FBI 1941-1942.

<sup>1583</sup> "Legionnaires Aid the FBI," J. Edgar Hoover, LPP Box 16, folder 3.

<sup>1584</sup> Address of J Edgar Hoover, Commencement, Notre Dame University, 10 May 1942, "Our Future," OF10b: DOJ FBI 1941-1942.

<sup>1585</sup> J. Edgar Hoover, "Legionnaires Aid the FBI," LPP Box 16, folder 3.



incurred harsh criticism for advocating investigations of the FBI back in 1940. “I hope you were misquoted and didn’t really want an investigation of the FBI,” E.C. Arnold wrote to him. The only American who should fear the FBI was “the criminal.” Hoover’s Bureau deserved the trust of everyone but those “making profit out of crime, and by the politicians” and the corrupt.<sup>1586</sup> As a harbinger of the sea change in American liberalism, the 1942 election season repudiated Norris’s voice of progressive reformism and he lost his seat.

The most striking sign of the times was Roger Baldwin’s qualified support of the wartime regime, particularly the FBI. Baldwin sat on a manuscript complaining that the FBI had grown ten times beyond its appropriations of World War I and repressed “subversive opinions.” Baldwin described Hoover as essentially having “the mentality of the average professional patriot, mollified in recent years by professions of liberalism.” Baldwin worried that fascists got less scrutiny than communists, that the Dies Committee influenced the FBI, military intelligence, secret service and anti-communism, formulating an attack on the “liberalism of the New Deal itself.”<sup>1587</sup> But he decided to withhold publication of this wartime critique, seeing Hoover as the lesser evil compared to Dies. An interview convinced Baldwin that Hoover “largely changed his views on the dangers from labor and the left. He is violently anti-Dies and all the witch-hunting for reds.” Meanwhile, Attorney General Biddle and the FBI’s wartime record demonstrated a “scrupulous adherence to legal methods, and no trespass beyond the legitimate field of investigation.” There were a “few exceptions,” only “to be expected in so large an organization,” with all its “transgressions. . . apparently disciplined.”<sup>1588</sup> Baldwin now emphasized liberalism as the FBI norm and lawlessness as the exception.

As for the sort of “exceptions” Baldwin might have had in mind, an important general point should be made. The most aggressive exercises of domestic power usually involved the intersection of presidential power with the criminological state, the subordination of the rule of law to the democratically elected executive. The complex meaning of the liberal security state emerged in the FBI’s record and reputation, and in the very fact that the most questionable exercises of power came not from mobs or the Justice Department’s bureaucratic machinery or even the military, but from the democratic presidency itself. Substantively speaking, the least liberal, least democratic expressions of the security state arose from the most liberal and most democratic parts in terms of form. Three examples illuminate this paradox of the wartime liberal security state—the Nazi saboteur trials, martial law in Hawaii, and, the one that troubled Baldwin most of all, Japanese internment.<sup>1589</sup>

At the apex of power, Roosevelt’s security state blended civil and military authority, transgressing the traditional limits of both. Its liberalism was wholly a function of his own graces. Among the most radical expressions of the new regime’s power was the Nazi saboteur case. The FBI first confronted the eight infamous saboteurs and succeeded in turning George Dasch against the rest, offering to pressure Roosevelt to pardon him in exchange for a guilty plea in front of a civil judge. Instead, Roosevelt ordered that he and the rest appear before a military

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<sup>1586</sup> E.C. Arnold to Senator George W. Norris, 29 Feb 1940, OF10b: DOJ DBI 1940.

<sup>1587</sup> Civil Rights and the F.B.I., 12 March 1942, RBP MC 005, Box 22 Folder 1: Race Relations..

<sup>1588</sup> Memo by Roger Baldwin, July 1943, RBP MC 005, Box 22, Folder 1: Race Relations..

<sup>1589</sup> Sparrow’s formulation, associating state repression with the FBI and domestic welfarism with New Deal liberalism, does not satisfactorily grapple with the mutual constitution of these different parts of the government, nor with the seeming irony that the liberal welfare statist like Roosevelt more strongly favored Japanese Internment than the FBI did. Sparrow, *Warfare State*, 89.

tribunal, the first on American soil since the conviction of Lincoln's assassins, and without the procedural protections afforded by court martial. With Biddle's assistance Roosevelt circumvented the need to formally suspend habeas corpus, and then circumvented traditional military law by superseding the military's role under the Articles of War to review the trial record, adopting that authority all for himself.<sup>1590</sup> Although there arose institutional jealousies—for example, irritated Secret Service agents who had tracked the targeted spies only to see the FBI claim all the credit—Roosevelt's subordination and micromanagement of both civilian and military legal authority peaked, at least within the continental United States, with the Nazi saboteur cases.<sup>1591</sup>

The militarization was fullest in the west, the frontier from whose horizon the Japanese war planes had arrived. Alcatraz, a civilian facility adopted from the military, once again became a venue of national security strategizing. Having been transferred from the Navy to the Justice Department, the prison island considered a site for the military's anti-aircraft guns.<sup>1592</sup> In the heat of war, the peacetime era of New Deal America started to look like a civilian interregnum in retrospect.

Further west, in the territory of Hawaii, national fears about the large Japanese-American plurality culminated in a form of repression that was in ways both more inclusive and more complete than what commenced on the mainland. The federal government had prepared for over a decade for extreme measures taken against the specter of Japanese disruption. The Hawaii Sugar Planters Association had networked with the ONI, MID, and FBI since the 1920s to track the Japanese American population of Hawaii.<sup>1593</sup> Fears about sabotage prompted President Roosevelt in 1936 to request the creation of a list of suspected Japanese on Oahu, "who would be the first to be placed in a *concentration camp* in the event of trouble."<sup>1594</sup> One year before Pearl Harbor, as the FBI was ramping up security-state federalism on the continent, the Bureau urged the Honolulu Police Department to build its own espionage unit at the end of 1940. But detention policies alone would not suffice. There were just too many Japanese Hawaiians to intern them all. By 1941, thirty-seven percent of the civilian population was of Japanese-descent. To manage Japanese Hawaiians meant regulating society as a whole. Plans for martial law had been considered since the 1920s.<sup>1595</sup>

The martial law and military occupation of Hawaii marked the purest expression of New Deal wartime criminal justice power, administered under Harold Ickies's Department of Interior with his full support, at least initially. Within hours of the Pearl Harbor attack, Hawaii's territorial governor Joseph P. Poindexter, proclaimed Hawaii under martial law. Taking it a step further, Lieutenant General Walter C. Short immediately established an even more extreme military law, which subsumed civilian life under his own territorial rule, at which he enjoyed immense discretion. Although fewer than fifteen hundred were interned, the custodial detention index immediate triggered arrests. The FBI organizationally directed the round up, with military

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<sup>1590</sup> Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, KS: University Press of Kansas, 2003), 43–53.

<sup>1591</sup> William D. Hassett, *Off the Record with F.D.R. 1942–1945* (New Brunswick: Rutgers, 1958), 74–5.

<sup>1592</sup> J.A. Johnston to James V. Bennett, 4 May 1942, AAF Box 7.

<sup>1593</sup> Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise: Martial Law in Hawai'i during World War II* (Honolulu: University of Hawai'i Press, 2016), 14.

<sup>1594</sup> Quoted in Scheiber and Scheiber, *Bayonets in Paradise*, 17.

<sup>1595</sup> Scheiber and Scheiber, *Bayonets in Paradise*, 23, 2, 16

help. The Honolulu police department's own espionage unit helped conduct the arrests of Japanese-Hawaiians on custodial detention lists—these included Shinto and Buddhist clergy, Japanese language school teachers, and community leaders.<sup>1596</sup> But beyond those targeted for detention, almost all inhabitants were more scrutinized and controlled than most Americans on the mainland. Military law turned the territory into an open-air prison, where virtually the entire Bill of Rights was suspended for almost the entire population.<sup>1597</sup> Military “general orders” policed society on the island. On occasion, civilian police did clash with military authorities, but in general had to enforce military dictates.<sup>1598</sup> Other local officials eagerly welcomed the state of affairs. As the least restrained manifestation of security-state federalism, law afforded great opportunities for local officials. Honolulu police chief William Gabrielson told his mentor August Vollmer he only wished he could see the benefits of martial law—all the equipment he requested, “no delays, no fuss with attorneys, no jury trials”—and said the war taught him that the “normal, peacetime organization of a police department must be reorganized.”<sup>1599</sup>

### Internment and the Last Frontier

Within the continental United States, the most pronounced intersection of civilian power, military power, and criminal law also occurred in the west—in the program of Japanese-American evacuation, relocation, and internment. Roosevelt's internment policy required the smooth coordination of all the levers of state power. The army seized and detained inmates in their “assembly centers.” After processing they were moved to one of the ten camps run by the War Relocation Authority (WRA), a new civilian agency.<sup>1600</sup> Workers under the Works Projects Administration, an agency previously involved in building and renovating jails and prisons, now helped run the assembly and relocation centers for over half of 1942.<sup>1601</sup> Roosevelt's Executive Order 9066 and General Dewitt's Public Proclamation No. 3 became enforceable through criminal penalties thanks to Congress's legislation of March 21, 1942, which established that anyone who knowingly defied “the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War,” as it concerned indicated military zones would be “guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or

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<sup>1596</sup> Scheiber and Scheiber, *Bayonets in Paradise*, 214, 9, 3, 46, 44.

<sup>1597</sup> Although sometimes cited as an argument for the lack of necessity in internment, Harry N. Scheiber and Jane L. Scheiber summarize the reality: “Nearly every civil liberty guaranteed in the Bill of Rights of the Constitution and its subsequent amendments was set aside for some or all of the civilian population Hawai'i, including the First Amendment rights of freedom of religion, of speech, of press, and of assembly; the Fourth Amendment guarantee of freedom from unreasonable search and seizure; the Fifth Amendment's guarantee of due process; the Sixth and Seventh Amendment's rights to trial by jury, confrontation of witnesses, and right to counsel; and the Fourteenth Amendment's right to equal protection of the laws.” *Bayonets in Paradise: Martial Law in Hawai'i during World War II* (Honolulu: University of Hawai'i Press, 2016), 4.

<sup>1598</sup> Scheiber and Scheiber, *Bayonets in Paradise*, 55, 74.

<sup>1599</sup> Gabrielson to Vollmer, 20 April 1942 and 25 April 1942, AVP Box 11: Gabrielson, William A 1940–1953.

<sup>1600</sup> Greg Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA: Harvard University Press, 2001), 4.

<sup>1601</sup> Jason Scott Smith, “New Deal Public Works at War: The WPA and Japanese American Internment,” *Pacific Historical Review* 72, No. 1 (February 2003), pp. 63–92, 64. On the WPA's construction of prisons and jails, see “Building Carceral Liberalism,” chapter 4 of this dissertation.

both, for each offense.”<sup>1602</sup> Aside from an exercise in executive power, Japanese internment amounted to an extensive congressional extension of criminal jurisdiction, the final federal assertion of law enforcement authority over the western states.

Along with the bureaucratic cooperation, the particular innovations in criminal law produced the wartime apotheosis of security-state federalism. Internment relied on the securing of law and order, producing internal systems within the policed boundaries of the camps. Day to day, the federal government policed the population in the most intimate ways. A June 1942 police report for Tulare Assembly Center included a water fight in the shower and spitting out of the window as examples of “disorderly conduct.”<sup>1603</sup> Offenses ranged from public intoxication—such as when a young man was caught “drinking ‘sake’”—to alleged political disloyalty.<sup>1604</sup> At the same time, while Japanese internment radically enhanced national criminal jurisdiction in the west, internment policy also required a sharing of enforcement duties between national and state officials. At Tule Lake Segregation Center, which housed 16,000 people, a memorandum noted that the federal government had “not accepted exclusive federal jurisdiction over the land” and so “criminal jurisdiction of the State of California prevails.” The State District Attorney would cooperate with federal officials, serving the interests of both levels of government.<sup>1605</sup>

Policing the camps not only marked a remarkable deployment of security-state federalism, but demonstrated a high-water mark of security-state liberalism. The security personnel within the camps embodied this ethos—in the breadth of their duties and the emphasis on order, training, and community engagement. Within a relocation center, patrolmen were hired for surveillance, “the protection of property and persons, enforcement of laws and ordinances” and “traffic control.” Those high school graduates with police training and law enforcement experience, or who took college coursework on policing, could apply.<sup>1606</sup> A standard Army Relocation Authority job description for a patrolman emphasized “the protection of life” and “property” as well as “law and order.” Patrolmen would monitor those “known to be disloyal” and those “whose loyalty to this country is doubted.” They would guard against “sabotage” and “riot” and would ideally have experience in law enforcement.<sup>1607</sup> Such personnel reported to the internal security officer, who would need even more experience and law enforcement training.<sup>1608</sup> At the top stood the Chief of Internal Security, ultimately in charge of “enforcement of all rules and regulations relating to the management of peace and order within the boundaries of the area occupied by the segregation center,” as well as maintaining the “operation of an intelligence program” to guard against “subversive activities.”<sup>1609</sup> At Tule Lake, Chief of Internal Security Willard E. Schmidt personified the liberal security-state, advocating for the use of shotguns rather than .45 pistols among administrative police, because while the latter was typically lethal shotguns “would only result in a slight casualty case and in only a few

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<sup>1602</sup> 56 Stat. 173, 18 U.S.C.A. 97a.

<sup>1603</sup> Police Record of Complaints, 3 June 1932, JAERR Box 35, Microfilm Reel 14.

<sup>1604</sup> War Relocation Authority Internal Security Case Report #260, WESP Box 1 Folder 5.

<sup>1605</sup> Memorandum of Agreement, 1 December 1943, WESP Box 1 Folder 5.

<sup>1606</sup> Standard Position Description, Office for Emergency Management War Relocation Authority, 13 May 1943, William Schmidt Collection, CSUJADP.

<sup>1607</sup> Standard Position Description, Office for Emergency Management, 16 May 1943: Patrolman, WESP Box 1 Folder 5.

<sup>1608</sup> Standard Position Description: Internal Security Officer, 14 May 1943, WESP Box 1 Folder 5.

<sup>1609</sup> Standard Position Description: Chief of Internal Security, 1 December 1943, WESP Box 1 Folder 5.

exceptional cases will death be the result.”<sup>1610</sup> Camp security relied on the pretense of humanitarianism.

Policing the community required a balancing act between liberal accommodation and racial repression. Those concerned with stability saw value in Buddhist priests appealing to the population’s spirituality.<sup>1611</sup> Security officials were expected to work with Japanese-American “evacuee leaders for the maintenance of law and order.”<sup>1612</sup> But although Japanese-American community leaders assisted with security, the racial hierarchy was always maintained and white officers were more entrusted. As the chief of internal security at the Granada Project in Amache, Colorado, wrote, he awaited having “my Caucasian Police-men at full strength so we can take over when the Army decides to move out.”<sup>1613</sup>

The internal security of the camps meant stamping out subversion. If the camps amounted to a form of relatively liberal incarceration, an effective means of crushing dissent was the threat of more repressive incarceration within. At Tule Lake, a man named Shimizu and seventeen others found themselves detained in the stockade for political reasons. In February 1944, he assured the WRA that if they were to “ask for our assurance that we do not meddle in politics again, we will, in every respects, cooperate.”<sup>1614</sup> They were released, after signing a statement pledging their “desire. . . [to] see the normalcy re-established in this Tule Lake Center and ever-lasting peace preserved by the spirit of cooperation and better understanding between the Administration and the Colony.”<sup>1615</sup> The next month the Co-Ordinating Committee was pleased to report that the “condition of the center has improved” but “complete normalcy is still far away.”<sup>1616</sup>

Maintaining the correct political ethos at the camps meant both negotiation and repression. Japanese internment posed the biggest test to the institutional limits of the liberal security state.

But the political implications of internment transcend questions of jurisdiction and internal suppression of dissent within the camps. Such questions implicate liberal leadership itself. Roosevelt and his trusted team emerge as the face of internment no less than the face of New Deal liberalism.<sup>1617</sup> Roosevelt made his decision after considerable deliberation and after years of pondering restrictions on Japanese-American liberties. Back in 1936 Roosevelt floated the idea of internment in Hawaii, before his secretaries of the army and navy convinced him that their general detention list would suffice. FDR hardened on Japan after Hitler’s invasion of Poland and saw Japanese-Americans as proxies for the empire.<sup>1618</sup> An FBI report in November 1940 that rebutted the military’s pessimistic views of Japanese-Hawaiian loyalty failed to move

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<sup>1610</sup> War Relocation Authority, From Willard B Schmidt, to Mr R. R. Best, Project Director, 28 February 1944, WESP Box 1 Folder 2.

<sup>1611</sup> Memorandum, To: Advisory Council, From: Co-ordinating Committee: Subject: Employment of Priests and Social Workers and Educational Lecturers, 16 March 1944, WESP Box 1 Folder 1.

<sup>1612</sup> Standard Position Description: Internal Security Officer, 14 May 1943, WESP Box 1 Folder 5.

<sup>1613</sup> Tommy Tomison, Chief Internal Security, 19 May 1944, WESP Box 1 Folder 5.

<sup>1614</sup> Report of the Informal Meeting of the Stockade Internees and the Co-Ordinating Committee of the Tule Lake Center, 5 February 1944, WESP Box 1 Folder 5.

<sup>1615</sup> Tulare Lake Center, To: Co-Ordinating Committee, February 1944, WESP Box 1 Folder 1; Harry L Black to Mr. Best, Executive Office of the President Office for Emergency Management: Office Memorandum, 8 February 1944, WESP Box 1 Folder 1.

<sup>1616</sup> Memorandum: Co-Ordinating Committee to Mr. W. Schmidt, Chief of Police, 9 March 1944, WESP Box 1 Folder 5.

<sup>1617</sup> In recent decades historians have focused more on the particular responsibility of Roosevelt. See Robinson, *By Order of the President*, 6.

<sup>1618</sup> Robinson, *By Order of the President*, 60.

the president.<sup>1619</sup> The Federal Communications Commission had found no basis for accusations of signaling to Japan and an Office of Naval Intelligence investigation in autumn 1941 found both Issei and Nisei to be loyal.<sup>1620</sup> Biddle, “determined. . . to avoid mass internment, and the persecution of aliens that had characterized the First World War,” labored in December 1941 to surgically implement detentions.<sup>1621</sup> But the administration adopted the mass evacuation policy after a few more months of deliberation. U.S. General John DeWitt, whom Biddle characterized as tending to “reflect the views of the last man to whom he talked,” turned against Japanese-American civil liberties at a crucial moment, persuaded in part by a commission chaired by Supreme Court Justice Owen J. Roberts. On February 17, Biddle caved to DeWitt, rejecting Biddle’s Assistant James H. Rowe and Alien Enemy Control Unit Director Edward J. Ennis’s pleas against evacuation orders.<sup>1622</sup> Then DeWitt’s “Final Recommendation” branded them an “enemy race.”<sup>1623</sup> The military claimed “military necessity” in its *Final Report, Japanese Evacuation from the West Coast*, but Roosevelt and the political branch bear ultimate responsibility for the wholesale deprivation of Japanese-American constitutional rights as well as for its modicum of liberal restraint.<sup>1624</sup>

The administration saw its Japanese-American policy as a liberal alternative to something worse. As with so many other policies, Roosevelt faced pressure from the extremes. Many Americans backed a more draconian approach to Japanese-Americans. In December 1942, almost half of Americans opposed returning Japanese Americans to the coast even after the war.<sup>1625</sup> The Dies Committee decried the “government’s alleged coddling of the Japanese in the camps,” as Roger Baldwin noted, which made Roosevelt’s administration seem comparatively liberal.<sup>1626</sup> But the attempt to strike a moderate balance could produce particularly draconian results. New Deal liberals who ran the WRA hoped to provide a humane and assimilationist alternative to the more exclusionist demands from the right, which yielded the systematic scrutiny of internees to root out disloyalty.<sup>1627</sup> In more general terms, if Roosevelt deserves credit for the relative liberality he also bears responsibility for its final brutality. In one of his few public statements on the matter, Roosevelt situated himself between extremes, defending the gradual release of Japanese-Americans and noting that “a great many lawyers” found “that under the Constitution they can’t be kept locked up in concentration camps.”<sup>1628</sup> Yet Roosevelt’s own legal experts approved the seemingly “moderate” internment policy as actually implemented. Biddle commissioned a report on the constitutionality of internment from New Deal lawyers Benjamin Cohen, an architect of the court-packing scheme, Oscar Cox, and Joseph Rauh, whose memo affirmed the “fact” that “Japanese who are American citizens cannot readily be identified

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<sup>1619</sup> Robinson, *By Order of the President*, 57, 60, 71, 62.

<sup>1620</sup> Ngai, *Impossible Subjects*, 176.

<sup>1621</sup> Quoted in Kennedy, *Freedom from Fear*, 749.

<sup>1622</sup> Kennedy, *Freedom from Fear*, 751, 752.

<sup>1623</sup> Robinson, *By Order of the President*, 85.

<sup>1624</sup> Kennedy, *Freedom from Fear*, 757.

<sup>1625</sup> Americans’ Views of Japanese Internment, Gallup, December 1942.

<sup>1626</sup> “What Future for Japanese Americans?,” RBP MC 005, Box 22 Folder 1: Race Relations..

<sup>1627</sup> Mae Ngai notes the “greater irony” that “WRA’s assimilationism led to the most disastrous and incendiary aspects of the internment experience—the loyalty questionnaire, segregation, and renunciation of citizenship.” See Ngai, *Impossible Subjects*, 179.

<sup>1628</sup> November 21, 1944, Quoted in Robinson, *By Order of the President*, 2.

and distinguished from” the disloyal.<sup>1629</sup> Even if many voices demanded an even more uncompromising policy, Roosevelt and his legal team’s posturing exposed the authoritarian potential of New Deal liberalism.

Perhaps the insistence on colorblind and polite rhetoric best captured the distinctively liberal quality of internment.<sup>1630</sup> So outwardly racist and uncompromising were some voices, the administration could pose as dedicated to safety and humanity. Dillon S. Myer, Director of the War Relocation Authority, rejected the term “concentration camp” and postured against the urge of illiberal racism.<sup>1631</sup> The American Legion’s Japanese Exclusion League opposed resettlement of Japanese Americans in the west, a position Myer rebutted in November 1943. He appealed to the Legion’s shared devotion to “uphold and defend the Constitution of the United States of America.” The WRA could effectively determine loyalty, Myer insisted, as he defended Roosevelt’s belief that Americanism was a “matter of the mind and heart,” and “is not, and ever was, a matter of race or ancestry.” Although he knew that “a great many people” felt “that all persons of Japanese ancestry should be confined under heavy guard for the duration of the war,” Myer considered “such a proposal fundamentally un-American” and “contrary to the constitution.” He believed America’s interest, consistent with “democratic faith,” required “opportunities for all its citizens without regard for race and ancestry.”<sup>1632</sup> Roosevelt’s liberal security state could thus maintain an unambiguously racist policy while condemning the even less contained racism of its critics.

The somewhat predictable attitudes of Dies, the American Legion, and Baldwin aside, the novel breakdown of opinion on internment signaled the political realignment within security-state liberalism. Whereas most newspapers endorsed internment, Old Right opponents of the New Deal counted among the most vocal critics. R.C. Roiles at the *Orange County Register* wrote that, “Few, if any, people ever believed that evacuation of the Japanese was constitutional. It was a result of emotion and fright.”<sup>1633</sup> While the American Communist Party extended its uncompromising support of the war effort to strong endorsement for internment, J. Edgar Hoover was opposed. When asked his opinion on interment, August Vollmer cited his “unbounded faith in J. Edgar Hoover,” and said he “would unhesitatingly approve the release of evacuees” whom

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<sup>1629</sup> Robinson, *By Order of the President*, 103–104.

<sup>1630</sup> The wartime development of liberal colorblindness has also received little attention, at least in its intersection with law and order. World War II is often treated as the crucible in which the contradictions of New Deal liberalism begin to crumble and a path became visible for a racial liberalism. The heroic efforts of black veterans to insist upon Double Victory—against fascism abroad and white supremacy at home—have received a lot of attention. But in fact the paradoxes of the zoot suit policing, of Japanese internment, of double victory, can better be reconciled by understanding the 1940s as the forging of American liberal colorblindness. John W. Dower’s study of the Pacific Theater as a race war in American minds suggests if anything an obsessive precision in differentiating “good” Asians, like the Chinese and Filipinos, from the “bad” Japanese. But colorblindness was a way for New Deal liberals to produce a racist domestic policy that accommodated a definitively non-colorblind worldview. John W. Dower, *War without Mercy: Race & Power in the Pacific War* (New York: Pantheon Books, 1996), 79.

<sup>1631</sup> Historians have divided on whether to credit Myer and the administration for eschewing the terminology “concentration camp.” Compare Bill Hosokawa’s favorable view in *Nisei: The Quiet Americans* (Boulder, University Press of Colorado, 2002) to Richard Drinnon’s *Keeper of Concentration Camps*. This debate is mentioned briefly by Greg Robinson, “Updating Historiography of Japanese Americans,” *Journal of American Ethnic History* 22, No. 4 (Summer, 2003), 67–71.

<sup>1632</sup> Dillon S. Myer, Director of the War Relocation Authority, delivered before a meeting of State Commanders and State Adjutants of the American Legion in Indianapolis, Indiana, 16 November, 1943, “Pennington Box 16, folder 2.

<sup>1633</sup> Roiles, *Orange County Register*, 14 October 1942.

Hoover thought “worthy to be released.”<sup>1634</sup> The majority “of the native born persons of Japanese parentage are undoubtedly good citizens and will not give the government any trouble if released,” Vollmer continued.<sup>1635</sup> Compared to the most adamant New Dealers in the security-state coalition, Old Right detractors, Vollmer, and even Hoover represented an older liberalism, skeptical of domestic power. Yet Hoover still enforced the policy and Vollmer still counted himself a Democrat dedicated to the enforcement regime. Support for the security-state did not line up cleanly with support for its worst excesses, which had become a matter on which reasonable liberals disagreed. Such pluralism could obscure a multitude of repressions.

The minds associated with Roosevelt’s legal legacy mostly capitulated to internment while claiming the banner of law. The Supreme Court’s three major decisions regarding internment reflected this tension. In 1943, the Court unanimously affirmed the curfew order in *Hirabayashi*. Justice Frank Murphy concurred while condemning racist policy.<sup>1636</sup> The next year, the Court affirmed the executive order 9066 by a 6–3 majority in *Korematsu*.<sup>1637</sup> The *Korematsu* Court divided Roosevelt’s appointees. Roosevelt’s former Attorneys General Murphy and Jackson, who greatly expanded the FBI, joined conservative Owen Roberts in dissent, but Roosevelt’s other six men on the bench ratified the New Dealer’s internment policy. Roosevelt’s former surveillance man in the Senate, Hugo Black, penned the notorious decision, joined by Roosevelt appointees Harlan Stone, Felix Frankfurter, Stanley Reed, William Douglas, and Wiley B. Rutledge. Then, in *Ex parte Endo*, the Court unanimously condemned the continuing detention of an American deemed loyal—a narrow repudiation late in the war.<sup>1638</sup> Japanese internment pushed the pragmatic liberal consensus to its limits while revealing how far the most respectable champions of New Deal liberalism would countenance oppression before walking it back.

Japanese Internment, in the most severe way possible, was the starkest exception that proved the rule. Not mainly as Roger Baldwin meant it—as an exceptional overreaction compared to an otherwise restrained civil liberties record—but in a more fundamental thus more troublesome sense. Japanese internment was the most radical expression of security-state liberalism, the defining demonstration of its contours of power and underlying ethos, an instance not of the state’s failure to live up to its liberal values but a disturbing revelation of what liberal rule really meant. If the 1933 National Industrial Recovery Act was the “radical moment,” the boldest experimentation with borderline fascistic economic planning that demonstrated both the mobilizing potential and the terrible power of Roosevelt’s hybrid system of democracy and oligarchy—if the 1937 court-packing scheme was another flirtation of presidential dictatorship at the very precipice of where constitutionalism eclipsed into autocracy—then Japanese Internment was proof that New Deal liberalism was just flexible enough, just fearful enough, to confine a whole racial group to concentration camps based purely on national origin, so long as there existed some semblance of legal authority a shade or two more formalistic and humane than the doctrines that legitimated naked totalitarianism.<sup>1639</sup>

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<sup>1634</sup> See Larry Ceplair and Steven Englund, *The Inquisition in Hollywood: Politics in the Film Community, 1930–1960* (Urbana and Chicago: University of Illinois Press, 2003 [1973]), 197–198.

<sup>1635</sup> Vollmer to Galen M. Fisher 12 October 1942, AVP, Box 46.

<sup>1636</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

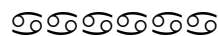
<sup>1637</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>1638</sup> *Ex parte Endo*, 323 U.S. 283 (1944).

<sup>1639</sup> See Katznelson, *Fear Itself*, ch. 7.



Thus did Japanese Internment affirm the institutional and ideological strength of the liberal security state. Japanese internment mobilized security state federalism in unprecedented ways. It was an illiberal program that helped in the pragmatic construction of a national liberal ethos. It extended jurisdiction to the west. In ways those members most associated with the traditional patters of the security state and war on crime were the most skeptical of the project. Roosevelt had eight appointees on the supreme court and the only two to rebuff him on internment were his two former attorneys generals, who helped build up the FBI. They were joined by conservative critics like Hoover. Even in the embarrassing retreat from the policies, the infrastructure remained, and now those split on internment could all the members of good standing in building the liberal state.



In affirming federal authority and capturing the American imagination, the liberal security state emerged victorious from the crucible of war mobilization. Frank Murphy succeeded in equipping the FBI to confront both common crime and the wartime enemy. Its cooperation with local police and sheriffs against security threats both large and small only demonstrated the war on crime's continuing relevance in constructing a modern, bureaucratic infrastructure of coercion. Roosevelt's mastery over law enforcement now extended to Manzanar and Hawaii, and the continental security state won the approval of radicals previously fearful of both federal and local police. By war's end, American politics no longer centered on progressivism, that trans-partisan middle-class reformism that transformed American institutions in the early-twentieth century. Crime policies, the security state, and wartime mobilization forever altered the political landscape. Roger Baldwin looked back on 1944 as a year when the "remarkable war record of maintaining freedom of public debate and minority rights" continued "with even less interference" by either "public or private agencies." Even as Japanese internment was winding down, the Supreme Court began protecting African-Americans.<sup>1640</sup> Hope for redemption resided in the increasingly dominant central state.

Roosevelt had reclaimed and refined liberalism through the ordeals of Depression and armed conflict, and this modified liberalism shaped America for decades. The war brought New Deal planning, the security state, and criminalization into their clearest combination with such measures as the 1942 Emergency Price Control Act, wartime regulation enforced through prosecution. This new ethos gripped both parties. In October 1943, *Look* published an interview in which Wendell Willkie hoped that the Republican Party would reclaim liberalism as its electoral strategy. The Democrats had claimed a "monopoly of liberalism," but their leaders comprised two illiberal groups, the big-city political machines of Chicago, Jersey, and New York, and the "Southern Democrats. . . who completely control the South's political machinery by denying the vote to a majority of its citizens, white and colored." Willkie conceded that Republicans had become corrupted, that they "forgot its own great liberal traditions." The GOP needed a "victory *within itself*," in which the "progressive and courageous members of the party must now re-establish its great liberal traditions—not just re-establish them, but carry them forward to solve the problems of a new world." The GOP had to become "*the great American*

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<sup>1640</sup> "Civil Liberties – 1944," 27 Feb 1945, RBP, MC 005, Box 22 Folder 2.

*liberal party.*"<sup>1641</sup> In 1944 Roosevelt himself credited Americans for having "the last three elections. . . transcended party affiliation," clamoring for "leadership. . . to advance the lot of the average citizen." He said Americans would seek "that same kind of liberalism to build our safer economy for the future."<sup>1642</sup> In the coming years both parties would compete to represent this new liberalism of economic opportunity, of an aspiration toward civil rights and justice, of a rejection of machine corruption.

More Americans voted in November 1944 for Roosevelt than Republican Thomas Dewey, but they had both entered the national scene as New York governors famous for facing down their state's criminals. The future of American politics and liberalism belonged to the crime warriors, to politicians like Roosevelt and Dewey, and Earl Warren. Serving as California's attorney general and governor, the liberal Republican Earl Warren unflinchingly championed Japanese Internment. In hearings in March 1942, Warren argued that the threat was too urgent for civil procedure, that the lack of sabotage or espionage by Japanese Americans only proved that they were quietly preparing for a nefarious attack.<sup>1643</sup> In 1944, Warren gave a keynote address to Republicans boasting the "spirit of youth" and the "energetic West."<sup>1644</sup> Warren indeed stood for the west, along with the future of America's new liberalism, still in its infancy. He had overseen California's evacuations of Japanese-Americans, the program that convincingly brought federal criminal and military jurisdiction to the west, and years later as Chief Justice of the Supreme Court he would finally impose liberalism on the South. From wartime internment to civil rights, Warren played a leading role in the closing chapters of the long story of law and legitimacy characterizing the United States since 1865—the struggle for enforcement authority that culminated in the mutually constitutive forces of a modern liberalism and a modern security state.

While the liberal state faced its ultimate test in war and many subsequent trials in the Cold War and struggle against segregation, it was the New Deal war on crime that had strengthened, refined, and prepared it. In World War II, the New Deal security state, borne from the New Deal war on crime, finally put an answer to three questions. One had lingered since the beginning of the New Deal: Would the New Deal state's legitimation of national enforcement authority withstand the test of a major national crisis? The Great Depression did not actually answer this question. True legitimation of the national state meant societal consent toward its instruments of coercion. The liberalism that arose in the 1930s, changed in the 1940s, and went on the shape most of the rest of the twentieth century had to prove itself adept at waging its two-front war.

The second question had gone back to World War I, after which the security state collapsed and withered. Yes, World War II could mobilize American institutions, but would they ratchet back to triviality after peace? World War II was different from World War I in large part because the New Deal was different from peacetime Wilsonian America. The coercive edge of the state had grown every year under Roosevelt, bringing American society into support. The war on crime coalition made the security state coalition of World War II not just possible but enduring. The institutions and relations built up in the 1930s would survive where those built in the 1910s had not. Roosevelt and his Attorneys General adopted an interwar chaos of authority,

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<sup>1641</sup> Wendell Willkie, "How the Republican Party Can Win in 1944," *Look*, October 4, 1943, RMP Box 217 Folder 3.

<sup>1642</sup> Roosevelt, "Address to the Democratic National Convention in Chicago," 20 July 1944, APPUCSB.

<sup>1643</sup> Robinson, *By Order of the President*, 126–7.

<sup>1644</sup> Keynote Address of Governor Warren, 26 June 1944, RMP Box 57, Folder 62.

exacerbated by the Red Scare, Prohibition, Depression, and the gangster crisis, and retooled the machinery of repression to be robust enough, refined enough, and just liberal enough to withstand the pressures of World War II without collapsing into the institutional and cultural anarchy that followed World War I.

The third question had deep roots in the nineteenth century. What would be the role of the national government after the crisis of the Civil War? The racial and regional divisions in particular threatened to undercut the legitimacy of even a workable domestic central state. War and conquest could mobilize Americans but they also provoked backlash. World War II tested the New Deal realignment that had been facilitated through war on crime federalism. There was an elastically defined but aspirational liberalism that now united the previously oppositional forces in American society—one whose own contradictions would prove manageable for at least the first chapters of the Cold War. This American creed was tested in the war on crime and withstood greater challenges at war, but after 1945 a larger coalition than ever could embrace this national creed. The government that policed the world in the name of liberalism was now fit to police the streets of America, in times of peace no less than times of war.

Historians look to the 1940s and beyond to explain the seeming paradox of liberal acquiescence in the security state—its national secrets, its military-industrial complex, its unlimited surveillance, war without end, deadly police raids, and mass incarceration. But if this is a paradox, it is one that originated with modern liberalism itself, from the very first moments of its creation. To gain political support for a new liberal state with all its promises and power, the New Dealers needed to conquer the phantoms of lawlessness. In doing so, they built a regime that unified law enforcers and academics, that brought together sheriffs and federal spies, that satisfied radicals and conservatives, that provided hope to white supremacists and racial liberals, and that could somehow even establish martial law and concentration camps without losing all legitimacy in the minds of advocates for civil liberties and civil rights. It was not *despite* or *during* but rather *through* that process—the New Deal’s adoption of the war on crime and construction of the modern security state—that liberalism as we know it was born.

## *Conclusion*

America's modern system of government requires that its enforcers enjoy deference from society and the states, a deference more reliable than what existed before the Roosevelt administration. Before the New Deal, occasions of transformative national mobilization arose from exigencies and usually wars. Federal law-enforcement power receded after Reconstruction and after World War I, if not totally. National enforcement could not sustain through tacit consent what it could fleetingly obtain through conquest. Prohibition, the most intimate extension of national power at peacetime, clarified the crisis of legitimacy and its importance to enforcement.

The New Dealers broke down previous barriers to produce an unprecedented consensus around crime, which at last broadly legitimated national enforcement authority. Politically speaking, the achievement meant bridging the partisan spectrum, along with bringing labor, the white South, and African Americans behind institutions they had long had cause to distrust. Culturally speaking, the national agenda achieved unprecedented collaboration and consensus among the criminological and legal communities. Structurally, this achievement produced a new settlement among previously competing federal agencies and between the national and state authorities. This restructuring of federalism not only enabled the war on crime but the New Deal state itself.

This new form of government, continually reliant on its enforcement authority, defined American politics at the center of the twentieth century. In both the particular mechanics and the ideological resonances, the 1930s war on crime stabilized the instruments of repression that came to constitute the security state that survived World War II without collapsing into chaos. But the full significance of the legitimating work unfolded after the war. In the long term, this national regime not only facilitated a multi-pronged militancy against domestic crime but also enforced civil rights, overtook the states as the primary collector of tax revenue, constructed a growing regulatory apparatus, and cultivated the largest permanent overseas presence of all the world's nations.

New Deal liberalism and the modern security state arose in simultaneous and mutual development. The liberalism of the New Deal aided in the breadth of political legitimation, by constructing a promise of protection that was at once more inclusionary and yet uncompromising toward outsiders and a conception of criminality that was both more potentially egalitarian yet accommodating of the institutions of established social, economic, and political power. In the process of revolutionizing law enforcement, the national government, and American power, the New Dealers, waging their war on crime, also transformed liberalism. Roosevelt set out to do so in regard to the welfare state, but the experimentation with enforcement similarly shaped the pragmatic, nationally minded liberalism, in both its legal and social theory. Through fighting crime liberalism resolved its interwar contradictions in favor of a new consensus on the security state as a guardian against lawlessness and subversion. Before the New Deal, every flavor of liberalism entertained an unstable balance of realism and idealism. The Reconstructionists recognized the impossibility of a freedom without equality but overestimated their vision's purchase among white Americans. The classical liberals cast themselves as realists on the limits of power but were taken by idealism about the industrializing market. The progressives recognized the problems of economic inequity but idealized the redemptive power of the state. The New Deal liberals grasped the failures of the past liberalisms and embraced the difficult,

even cruel consequences of power, but they were complacent about the permanence of their own settlement and its long-term costs.

Although the fusionism of Hobbesian state violence and restraint dissolved many earlier paradoxes of liberalism, important points of agreement could not forever captivate the same proportion of Americans as Roosevelt had. A couple generations after Roosevelt died, many commentators noted the end of the New Deal coalition. But the war on crime coalition thrived, into the next century, building on a broad consensus to expand incarceration and militarize policing at every scale.

### Abbreviations Used in Notes

AAF	Alcatraz Administrative Files
ACLUNC	American Civil Liberties Union of Northern California records, 1900–2000 (bulk 1934–2000)
AGAC GC	General Correspondence, Attorney General Advisory on Crime Records
AGAC SF	Subject Files, Attorney General Advisory on Crime Records
AGSRP	Records of the Attorney General’s Survey of Release Procedures
APPUCSB	American Presidency Project, University of California, Santa Barbara
AVP	August Vollmer Papers
AWN	Wardens’ Notebook Pages, Alcatraz
BCPD	Berkeley, California, Police Department Records
BOPAF	Records of the Bureau of Prisons, Administrative Files
DCBC	Department of Commerce Bureau of Census
DEASF	Drug Enforcement Administration Subject Files, Subject Files, 1916–1970, Department of Justice Bureau of Narcotics
DOJ	Department of Justice
DOJA	Department of Justice Abstracts
ERP	Eleanor Roosevelt Papers
FDRFBP	Franklin D. Roosevelt Family, Business, and Personal Papers
FDRGP	Franklin D. Roosevelt Governorship Papers
ELP	Ernest Lendeen Papers
FBI	Federal Bureau of Investigation
FFMP	Frank F. Merriam Papers
GC	General Correspondence
HAP	Harry Anslinger Papers
HCDOJ	Speeches of Attorney General Homer Stille Cummings, Justice Department Website
HHSF	Herbert Hoover Subject Files
HLP	Herbert Lehman Papers
HMP	Henry Morgenthau Papers

ILP	Ivy Lee Papers
JAERR	Japanese American Evacuation and Resettlement Records, 1930–1974
JFP	Jerome Frank Papers
LDWP	Lillian D. Wald Papers
LND	The Living New Deal, University of California, Berkeley, Website
LPP	Lee Pennington Papers
MVWP	Miriam Van Waters Papers
MWDP	Mary W. Dewson Papers
OF10	Official Files 10, Department of Justice
OF10b	Official Files 10b, Department of Justice, FBI Reports
OF21	Official Files 21, Department of Treasury
OF117	Official Files 117, Crime
OF431	Official Files 431, Narcotics
OFD	Osmond Fraenkel Diaries
OWWP	Orlando Winfield Wilson Papers
MHP	Marshall Harland Papers
PETSG	Papers of Eleanor T. and Sheldon Glueck, 1911–1972
PHSC	Papers of Homer S. Cummings
PICCHWA	President’s Interdepartmental Committee to Coordinate Health and Welfare Activities
RBP	Roger Baldwin Papers
RG	Record Group
RMP	Raymond Moley Papers
ROLEC	Records of the Office of the Assistant Secretary for the Enforcement and Operations, Records of the Office of Law Enforcement Coordination
RSPC	Records for the Society for the Prevention of Crime
SFPDR9	San Francisco Police Department Records, Police District No. 9
SFPDRSFPL	San Francisco Public Library, San Francisco Police Department Records
USPAI	Textual Records of the U.S. Penitentiary, Alcatraz Island
WESP	Willard E. Schmidt Papers

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Albert and Shirley Small Special Collections Library, University of Virginia, Charlottesville, VA  
Papers of Homer S. Cummings

Arthur and Elizabeth Schlesinger Library on the History of Women in America, Harvard University, Cambridge, MA  
Miriam Van Waters Papers

Bancroft Library, University of California, Berkeley, CA  
August Vollmer Papers  
Berkeley, California, Police Department Records  
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Orlando Winfield Wilson Papers  
San Francisco Police Department Records, Police District No. 9

California Historical Society, San Francisco, CA  
American Civil Liberties Union of Northern California records, 1900–2000

Columbia University Rare Book & Manuscript Library Special Collections, New York, NY  
Herbert Lehman Papers  
Records of the Society for the Prevention of Crime

Eberly Family Special Collections Library at Penn State, State College, PA  
Harry Anslinger Papers

Franklin Roosevelt Presidential Library, Hyde Park, New York  
Department of Commerce Bureau of Census  
Eleanor Roosevelt Papers  
Franklin D. Roosevelt Family, Business, and Personal Papers  
Franklin D. Roosevelt Governorship Papers  
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  - General Correspondence, 1934–1938, Attorney General Advisory on Crime, Records Relating to Special Investigations and Survey
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